Jurisdictional Statement

81-589

No.

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Supreme Court of the United States

October Term, 1981

FORREST McCLUNEY,
Appellant,

vs.

JOS. SCHLITZ BREWING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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ISSUE PRESENTED

Did the Court of Appeals err in holding that application of the Missouri service letter statute violates the due process clause of the United States Constitution, because of the lack of any significant contacts between the employment contract and the State of Missouri, where the employment contract was executed in Missouri between a Missouri resident and a corporation qualified and doing business in Missouri, and where the contract was performed in Missouri for more than fourteen years, but where the employee was then promoted and transferred to North Carolina for five years and subsequently, to Wisconsin for three months where he was fired.

TABLE OF CONTENTS

Issue Presented I
Table of Authorities III
Opinions Below 1
Statement of Jurisdiction 2
Constitutional Provisions and Statutes Involved 3
Statement of the Case 4
Statement of Reasons for Plenary Review 7
Proof of Service 15

Appendix—

McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578 (8th Cir. 1981) A1
Order—denying Schlitz' motion for summary judgment brought on grounds that Missouri service letter statute is not controlling A19
Memorandum and Order—clarifying district court's order that Missouri service letter statute is controlling A21
Denial of McCluney's motion for rehearing before the Eighth Circuit A24
Notice of Appeal A25
Standard Pretrial Order No. 2 ..... A27
Rimmer v. Colt Industries Operating Corp., No. 80-1765 (8th Cir. Aug. 11, 1981) A43

Table of Authorities

Allstate Insurance Co. v. Hague, 101 S.Ct. 633 (1981) 7, 11, 12, 13, 14
Bliven v. Brunswick Corp., 575 S.W.2d 788 (Mo. App. 1978) 7, 8, 9, 10, 11, 13, 14

Cheek v. Prudential Insurance Co. of America, 192 S.W. 387 (Mo. 1916), *aff'd*, 259 U.S. 530 (1922) 7

Dutton v. Evans, 400 U.S. 74 (1970) 2

Erie R. v. Tompkins, 304 U.S. 64 (1938) 14

Horstman v. General Electric Co., 438 S.W.2d 18 (Mo. App. 1969) 13

Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941) 8, 13, 14

McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578 (8th Cir. 1981) 7, 8, 13

Rimmer v. Colt Industries Operating Corp., No. 80-1765 (8th Cir. Aug. 11, 1981) 12

Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 2

United States Constitution, Fourteenth Amendment 3

Section 290.140 RSMo (1978) 3, 5, 9

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 649 F.2d 578 (8th Cir. 1981).

The orders by Judge Wright of the United States District Court for the Western District of Missouri concerning the application of the Missouri service letter statute, were not reported. These orders are reprinted in the appendix which follows.

STATEMENT OF JURISDICTION

This action was removed by Schlitz to the United States District Court for the Western District of Missouri, federal jurisdiction being based on diversity of citizenship. McCluney is a resident of Missouri, Schlitz is a Wisconsin corporation with its principal place of business in Wisconsin, being qualified and doing business in the State of Missouri, and the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

The Court of Appeals for the Eighth Circuit reversed and remanded the judgment entered in favor of McCluney, on his Missouri service letter claim, in a decision dated May 20, 1981. Appellant's motion for rehearing was denied on July 1, 1981. Notice of Appeal to the United States Supreme Court was filed in the Court of Appeals for the Eighth Circuit on September 8, 1981.

The United States Supreme Court has jurisdiction over this appeal under 28 U.S.C. §1254(2). The Court of Appeals for the Eighth Circuit held that the Missouri service letter statute was unconstitutional, as applied, because it violated Schlitz' right to due process of law as protected by the Fourteenth Amendment to the United States Constitution. 649 F.2d at 583-84. *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) ("Since, as will appear, the Court of Appeals held that a Georgia statute relied upon by the State at the trial was unconstitutional, as applied, there can be no doubt of the right of appeal to this Court. 28 U.S.C. §1254(2)"). *See Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 & n.7 (1954).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves a determination of whether applying the Missouri service letter statute, Section 290.140 RSMo 1978, as the governing law in this case, violates the due process clause of the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 290.140 RSMo 1978 provides:

> 290.140. *Letter of dismissal, when—failure, misdemeanor.*—Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service; and if any such superin-

tendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment.

STATEMENT OF THE CASE

The facts relevant to the issue raised in this appeal are straightforward. In 1955, Forrest McCluney was a vice-president of the Geo. Muehlebach Brewing Company, in Kansas City, Missouri. After Jos. Schlitz Brewing Co. purchased Muehlebach in 1956, Schlitz employed McCluney as the industrial relations manager for the newly acquired Kansas City plant. For purposes of vacation time and severance pay, throughout the tenure of his employment, Schlitz and McCluney agreed that his effective date of employment, which occurred in Missouri, was January 19, 1955, the date he was first employed by Muehlebach. In 1962, Schlitz promoted McCluney to plant manager of the brewery in Kansas City, Missouri.

In October, 1970, McCluney was promoted to plant manager of Schlitz' brewery in Winston-Salem, North Carolina, where he relocated. On May 12, 1975, he was elected, by Schlitz' board of directors, to the office of vice-president—operations. As a result of his election, McCluney was transferred to Schlitz' corporate headquarters in Milwaukee, Wisconsin, on May 14, 1975.

Shortly after his arrival in Milwaukee, McCluney requested that his secretary, in Winston-Salem, be transferred to Milwaukee, because of her competence and abil-

ities. On August 22, 1975, after several discussions of the matter, Eugene Peters, executive vice-president and general manager of Schlitz, told McCluney that if he continued to insist on transferring his former secretary, Peters would ask for McCluney's resignation. After some reflection, Peters told McCluney to forget this conversation.

On August 25, 1975, Peters asked McCluney if he had changed his mind about transferring his secretary and McCluney said that he had not, whereupon Peters asked for McCluney's resignation. McCluney refused to resign stating: "Oh, no. When I resign, I will pick the time, and when you fire me, you will pick the time." Peters then told McCluney to clean out his desk, and his successor would be named that day . When McCluney asked Peters about severance pay, Peters said when you resign, you don't get severance pay. McCluney reemphasized that he had not and was not going to resign. Schlitz issued a press release, saying that McCluney had resigned and a similar statement appeared in the Schlitz' management bulletin.

Through his Missouri attorneys, McCluney requested a service letter, as provided under Section 290.140 RSMo 1978, on November 7, 1975. Schlitz replied, on November 18, 1975, stating McCluney was "terminated by reason of [his] resignation."

McCluney and his family subsequently moved back to Missouri. Thereafter, this action was commenced in the Circuit Court of Jackson County, Missouri, and was removed by Schlitz to the United States District Court for the Western District of Missouri. The jury found that McCluney had been fired and awarded him $32,500.00 severance pay on his breach of contract claim. The jury also awarded McCluney $1.00 actual damages, and $400,000 punitive damages on his claim under the Missouri service

letter statute, finding that Schlitz' statement that McCluney had "resigned" was made intentionally in a willful, wanton and malicious manner.

Standard Pretrial Order No. 2, signed by attorneys for both parties and by the trial judge, set out the "issues at law, and no others [which] remain to be litigated at trial." The exclusive list of eighteen issues of law did not raise the issue of the constitutionality of applying the Missouri service letter statute to the case *sub judice*. Schlitz did not otherwise properly raise or argue this issue in the district court.

The issue of whether applying the service letter statute in this case would violate the due process clause was first raised in Schlitz' brief on appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit's resolution of this issue became the sole basis on which the court vacated that portion of the judgment in the trial court awarding McCluney damages on his claim under the service letter statute. The court held that the Due Process Clause was violated because there were constitutionally insufficient contacts between McCluney's employment relationship and the State of Missouri.

STATEMENT OF REASONS FOR PLENARY REVIEW

The matter of concern in this appeal raises substantial questions as to the extent of the contacts necessary to constitutionally apply the Missouri law to govern a contract executed in Missouri, partially performed in Missouri and terminated in Wisconsin. The majority decision of the Court of Appeals for the Eighth Circuit in this case, *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir. 1981), imposes a standard of necessary contacts which conflicts with this Court's recent pronouncement in *Allstate Insurance Co. v. Hague*, 101 S.Ct. 633 (1981), and interferes with a state's right to make its own choice-of-law decision in a diversity case.

The trial court held that the Missouri service letter statute became part of the employment contract between McCluney and Schlitz. Missouri has long held that the service letter statute becomes part of one's employment contract when that person is hired and works in Missouri for a corporation doing business in Missouri. *Cheek v. Prudential Insurance Co. of America*, 192 S.W.2d 387, 393 (Mo. 1916), *affirmed*, 259 U.S. 530 (1922). In applying the Missouri service letter statute here, the trial court relied on *Bliven v. Brunswick Corp.*, 575 S.W.2d 788 (Mo. App. 1978), which held that the service letter statute applies to employees who are hired and work in Missouri even though they are subsequently transferred out of Missouri where they are fired.

The Eighth Circuit, however, reversed the trial court, holding that it was an unconstitutional denial of Schlitz' due process rights to follow Missouri law in this case. 649 F.2d at 584. In order to reach that conclusion, it was necessary for the Court of Appeals to hold that there

were three separate employment contracts between Schlitz and McCluney, one for each position McCluney held in Missouri, North Carolina and Wisconsin, and that each previous contract was rescinded and a new contract formed each time McCluney was promoted and transferred. *Id.* at 583. The court then held there were insufficient contacts between Missouri and the "Wisconsin contract," the only contract the court held existed at the time McCluney was fired, to constitutionally apply Missouri law. *Id.* at 583-84.

The Court of Appeals erred in holding that each time McCluney was promoted and transferred, the existing employment contract between McCluney and Schlitz was rescinded and a new contract was formed rather than holding McCluney's transfer merely modified the existing contract. This holding, which is the basis of the court's conclusion that there were constitutionally insufficient contacts with Missouri, was a bare conclusion by the court, not supported by any authority. Judge Arnold, in his dissent, characterized this holding as "rather artificial, the kind of thing lawyers and scholars think up after the fact, rather than a consideration actually present in the minds of the parties when McCluney decided to accept Schlitz' offers of promotion."

Not only is this holding by the majority "artificial," but it is contrary to Missouri law. The trial court, applying Missouri's conflict of law rules, which it must do, *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), held the Missouri courts would apply Missouri law in this case, specifically *Bliven*. *Bliven* answers the question of whether the contract between Schlitz and McCluney was modified or was rescinded and replaced by another contract. The defendant corporation in *Bliven* entered into an employment agreement wherein *Bliven*

was hired as an assistant manager of a bowling alley, located in Missouri, which was owned by the defendant. *Bliven* continued in this capacity for a period of nine months, at which time he was transferred by Brunswick to become manager of a bowling alley in New Orleans, Louisiana. He worked in that capacity for five months. He was then transferred to a company owned facility in Council Bluffs, Iowa, as an assistant manager. After two months in Council Bluffs, Bliven was finally transferred to Wichita, Kansas, where he served as a manager for eight months before he was fired. After his termination, Brunswick failed to give a service letter under the Missouri statute, as requested by Bliven. After returning to Missouri, Bliven started the action in Missouri.

The Missouri Court of Appeals held that by operation of law, the employment contract entered into in Missouri by Bliven and Brunswick included the terms and provisions of Section 290.140, and that Brunswick breached the terms of that provision by failing to give the letter requested by Bliven after his termination.

The court rejected Brunswick's argument that by transferring Bliven to facilities in different states, the "chain was broken" and Brunswick was relieved of its obligations under the contract executed in Missouri. The court held there was one employment contract executed in Missouri which included in its terms, by operation of law, the service letter statute. In doing so, the court said, "In this modern day of many corporations operating in all the states and many foreign countries, if the transfer of an employee (over which he presumably has little or no control short of resignation), from one place to another, would change the obligations in terms of his employment contract instanter and from time to time the doctrine of *lex loci contractus* would be destroyed or, at the very

least, rendered meaningless and impossible of application." *Id.* at 791.

The majority opinion attempts to distinguish *Bliven* from the case at bar on the grounds that Bliven performed essentially the same function in each location, that the Missouri Court of Appeals characterized the involuntary transfers as part and parcel of the original contract, and that Bliven's employment outside of Missouri was apparently of a transient nature. Appellant asserts these distinctions do not distinguish *Bliven* from the case at bar. First, the majority opinion admits that it is "not entirely clear" from the opinion of the Missouri Court of Appeals that Bliven performed the same function at each location. That "fact" is not clear because it was not important to the *Bliven* decision. The Missouri court did not condition its rejection of Brunswick's argument that transferring an employee to another state terminates the original employment contract, on the fact that Bliven performed essentially the same function at each location, if in fact he actually did so. Second, the Missouri court's characterization of the involuntary transfers as "part and parcel of the original contract" was a statement of that court's conclusion as to the law in Missouri. This is a "distinction" with the case at bar only because the Court of Appeals reached a contrary, unsupported conclusion. Finally, the arguably transient nature of Bliven's employment outside Missouri was not a factor in the Missouri court's holding. That court indicated that in these modern times, a transfer of employment does not change the original obligations and terms of the employment contract. 575 S.W.2d at 791. The length of the employee's stay in each state was immaterial to the court's holding.

The *Bliven* decision is undistinguishable from the case at bar. Clearly, under Missouri *law*, as stated in that case, there was only one employment contract between Mc-

Cluney and Schlitz. Just as clearly, application of the *Bliven* decision would not violate Schlitz' due process rights.

The contacts necessary to satisfy due process must relate to the question fundamental to the majority's decision and which was answered in *Bliven;* whether each of McCluney's promotions and transfers rescinded the then existing contract and formed a new one or whether they merely modified the terms of one existing and continuing contract. Missouri has substantial contacts with this question. The employment contract, which under *Bliven* was merely modified, was executed in Missouri by a Missouri resident and a corporation doing business in Missouri, and the contract was performed in Missouri for almost fourteen years, nearly seventy percent of the time McCluney worked for Schlitz. Those contacts are far more substantial than the contacts present in *Allstate Insurance Co. v. Hague,* 101 S.Ct. 633 (1981), where the Court found sufficient contacts to satisfy due process requirements. In *Hague,* a Wisconsin resident, who worked in Minnesota, was killed in Wisconsin when a motorcycle driven by a Wisconsin resident, on which the decedent was riding, was struck by a car driven by a Wisconsin resident. The decedent's widow, who moved from Wisconsin to Minnesota after the accident, sued in a Minnesota state court, under three insurance policies issued to the decedent in Wisconsin by a company doing business in both Wisconsin and Minnesota. The Supreme Court held that there were sufficient contacts with Minnesota so that applying Minnesota law was not fundamentally unfair to the defendant insurance company so as to violate its due process rights.

The standard expressed by this Court in deciding constitutional choice-of-law questions under the Due Process Clause is to examine the contacts the state, whose law is being applied, has with the parties and with the

transaction. *Hague*, 101 S.Ct. at 638. A choice-of-law is invalid only if the parties and the transaction have no significant contact, which advances state interests, with the State whose law is applied. Interesting enough, Judge Heaney, the author of the majority opinion in the case at bar, subsequently authored an opinion which recognized that the service letter statute protects certain economic and social interests of the State of Missouri. *Rimmer v. Colt Industries Operating Corp.*, No. 80-1765 (8th Cir. Aug. 11, 1981). The court of appeals recognized that the Missouri statute attempts to assure that a Missouri worker's "ability to sell his skills to a potential employer would not be hampered by a previous employer's refusal to truthfully describe his work history" and to assure Missouri employers can " 'ascertain the degree of . . . intelligence . . . honesty, capacity and efficiency' of job applicants." Slip op. at 8. The presence of McCluney in Missouri after his termination by Schlitz and the execution and partial performance of the contract in Missouri certainly connect the transaction, parties and the State of Missouri so as to satisfy this standard.

It is not for the Eighth Circuit to say whether Missouri's choice-of-law, in applying the Missouri service letter statute, is to be preferred or whether it would make the same choice if sitting as a Missouri court. The sole function of the Eighth Circuit was to determine whether application of Missouri law exceeds federal constitutional limitations. *Hague*, 101 S.Ct. at 637. Justice Stevens properly stated the scope of a federal court's constitutional analysis in his concurring opinion in *Hague*:

> . . . It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule, nor is it our function to ensure that state courts correctly apply whatever choice-of-law rules they have

> themselves adopted. Our authority may be exercised in the choice-of-law area only to prevent a violation of the Full Faith and Credit or the Due Process Clause.

Id. at 650 (footnote omitted).

There is clearly a distinction between sufficiency of contacts for choice-of-law purposes and constitutional purposes. *Hague,* 101 S.Ct. at 637 n.8. Yet, the Eighth Circuit ignored these limitations and distinctions and impressed its own choice-of-law rules to eliminate what were otherwise significant Missouri contacts and then it held that due process was violated because there were no significant Missouri contacts. Such a bootstrap analysis misconstrues *Hague* and violates the principles of *Klaxon.*

The conclusion must be that the Court of Appeals erred when it held that application of the Missouri service letter statute violated Schlitz' right to due process of law. "[T]he [Court of Appeals'] decision harks back to a day when the federal courts were too ready to enshrine their own notions of proper conflicts rules in the Due Process Clause of the Fourteenth Amendment." *McCluney v. Jos. Schlitz Brewing Co.,* 649 F.2d at 586 (Arnold, J., concurring in part and dissenting in part). This is particularly true since the Missouri courts have already defined the limits of the extraterritorial application of the Missouri service letter statute. *Compare Bliven v. Brunswick Corp.,* 575 S.W.2d 788 (Mo. App. 1978) *with Horstman v. General Electric Co.,* 438 S.W.2d 18 (Mo. App. 1969).

The question presented in this appeal is substantial because it involves the extent to which a federal court of appeals may use the limitations of the Due Process Clause to control the application of a state's choice-of-law rules. The Eighth Circuit's majority opinion that McCluney and Schlitz had several employment contracts, not just one, is contrary to the law of Missouri, as expressed

in *Bliven*. By not applying that law, the majority violated the mandates of *Erie R. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon*. More significantly, the majority opinion exceeds the bounds recently expressed in *Hague*, and, therefore, has eroded that decision. The opinion does what this Court has not done since 1936; striking down a state's choice-of-law under the federal Constitution. It is a decision that conflicts even with Justice Powell's dissenting opinion in *Hague*, 101 S.Ct. at 650-652, and impinges on the long recognized right of a state to make its own choice-of-law decisions. For the court of appeals to use the provisions of our Constitution to strike a jury verdict it finds to be unacceptably large, is a heavy-handed approach that sets bad precedent and further muddies the waters of constitutional interpretation.

For the reasons stated above, appellant respectfully submits that this appeal presents substantial questions, so as to require plenary consideration, with briefs on the merits and oral argument.

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PROOF OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Jurisdictional Statement was deposited in the United States postal service, first class postage prepaid, to Paul Scott Kelly, Gage & Tucker, 2345 Grand Avenue, P. O. Box 23428, Kansas City, Missouri 64141, attorneys for Jos. Schlitz Brewing Co.

J. MICHAEL VAUGHAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1383

Forrest McCluney,
Appellee,

v.

Jos. Schlitz Brewing Co.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: January 14, 1981
Filed: May 20, 1981

Before GIBSON, Senior Circuit Judge, and HEANEY and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

The Jos. Schlitz Brewing Company appeals from a judgment pursuant to a jury verdict finding Schlitz liable for breach of an employment contract (Count I), and willful and malicious violation of the Missouri service letter statute, Mo.Ann.Stat. § 290.140 (Count II). We affirm as to Count I and reverse as to Count II.

I

In 1955, Forrest McCluney was a vice president for the Geo. Muehlbach Brewing Company in Kansas City, Missouri. Schlitz purchased Muehlbach in 1956 and hired McCluney as the industrial relations manager for its Kansas City plant; in 1962, Schlitz promoted McCluney to plant manager.

In 1970, Schlitz offered McCluney the position of plant manager at its Winston-Salem plant. That plant was considerably larger than the Kansas City plant. The promotion afforded him greater responsibility and promised a significant challenge. After weighing the competing benefits and burdens of accepting Schlitz's offer, he decided to accept it. Accordingly, he moved to North Carolina and started his new job. McCluney retained it for nearly five years.

In May, 1975, the executive vice president of Schlitz, Gene Peters, offered McCluney another promotion, the position of vice president of plant operations at Schlitz's corporate headquarters in Milwaukee, Wisconsin. This promotion promised McCluney even greater responsibilities, including overseeing corporate staff responsible for plant operations. A substantial salary increase was also part of the offer. McCluney accepted the offer for the challenge it presented and for the opportunity it offered to implement his management ideas. He moved to Wisconsin to begin his new job.

Once in Wisconsin, McCluney sought the transfer of his secretary, Lois Rinne, from Winston-Salem to Milwaukee. The company refused to transfer her, citing its formal management policy as the reason for the denial. McCluney asked Peters to make an exception in Ms. Rinne's case and push through the transfer. This request was

also denied. McCluney persisted with his request, arguing to Peters that Schlitz's management policy was on shaky ground from a legal standpoint as it had a discriminatory impact on women employees. He told Peters that if an exception was not made for Ms. Rinne, there would "come a parting of the ways." Peters replied that if McCluney persisted, Schlitz would have to demand his resignation. This confrontation took place on Friday, August 22, 1975. The next Monday, Peters asked McCluney if he had changed his mind. McCluney stated that he had not and Peters responded by asking for his resignation. McCluney retorted: "Oh no. When I resign, I will pick the time, and when you fire me, you will pick the time." Peters then instructed McCluney to clean out his desk. A replacement was subsequently named.[1]

Although Schlitz requested a letter of resignation from McCluney, he refused to tender one, reasoning in part that he would lose his severance pay if he did. Later that day, Schlitz issued a press release that stated McCluney had resigned. That release appeared in the Schlitz Management Bulletin and was reported in the Wall Street Journal, the Milwaukee Sentinel and the Twin City Sentinel (Winston-Salem). Three days after McCluney's termination, Schlitz sent McCluney a letter and enclosed a check as "final salary payment * * * following your resignation * * *." McCluney returned the check, denying that he had resigned.

A few months later, McCluney requested a service letter from Schlitz in the form provided for under Mo.Ann. Stat. § 290.140 (Vernon). Schlitz responded that Mc-

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1. A central issue at the trial was whether McCluney had voluntarily resigned or was dismissed involuntarily. The jury determined that McCluney's termination was involuntary. The evidence clearly supports that finding and we will not disturb it on appeal.

Cluney had resigned. Thereafter, McCluney filed suit in the Circuit Court of Jackson County, Missouri, alleging breach of contract, violation of the Missouri service letter statute and libel. Schlitz removed the case to federal court. The libel claim was dismissed on Schlitz's motion for partial summary judgment, and no appeal was taken from that dismissal. McCluney's other claims were tried to a jury.

The basis of McCluney's service letter claim was that Schlitz's response was false and, therefore, actionable under Missouri law. The jury determined that Schlitz had, in fact, violated the Missouri service letter statute. It assessed nominal damages at $1.00 and punitive damages at $400,000. The basis of McCluney's contract claim for severance pay was a company directive issued by Schlitz's director of personnel, Robert Creviston. Creviston's Memorandum was sent to each of the brewery industrial relations managers. Under the Creviston Memorandum, McCluney was entitled to six months severance pay for a total of $32,500. McCluney asserted that the Creviston Memorandum merely put into writing what had been the Company's long-standing practice, and that the Memorandum itself had been distributed to himself and people other than the brewery industrial relations managers. The jury determined that Schlitz had, in fact, breached its agreement to provide severance pay, and awarded McCluney $32,500.

II

The United States Constitution limits the power of a forum state to apply its substantive law to factual and legal situations with which it has little or no contact. The constitutional bases for the limitation are found in the Due Process Clause, *Allstate Ins. Co. v. Hague*, 101 S.Ct. 633, 637-638 & n.10 (1981); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S.

179, 180-81 (1964); *Home Insurance Co. v. Dick*, 281 U.S. 397, 407-410 (1930), and the Full Faith and Credit Clause.[2] *Allstate Ins. Co. v. Hague, supra*, 101 S.Ct. at 637-638 & n.10; *Clay v. Sun Ins. Office, Ltd., supra*, 377 U.S. at 180-181; *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 181-183 (1936); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 393 (1924).

Until recently, it was unclear whether the due process limitation upon a state's extraterritorial application of law mirrored the due process analysis for determining the limits of a state court's judicial jurisdiction. The concepts are closely linked, and commentators have suggested that essentially the same principle should be applied with reference to both situations. *See* Martin, *Personal Jurisdiction and Choice of Law*, 78 Mich. L. Rev. 872, 872-873 (1980); Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1591 (1978); Reese, *Limitations on the Extraterritorial Application of Law*, 4 Dalhousie L.J. 589, 593 (1978).

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2. The Supreme Court has recently suggested that the two constitutional provisions are operatively identical when a state applies its substantive laws extraterritorially. *Allstate Ins. Co. v. Hague*, 101 S.Ct. 633, 637-638 & n.10 (1981). Mr. Justice Stevens, concurring in the result and thus creating a majority, reasoned, however, that the conceptual framework of the two clauses are different and, therefore, proper analysis under either must necessarily be logically distinct. *Id.* at 644-645. *See generally* R. Leflar, American Conflicts Law §§ 55-62 (1977); R. Weintraub, Commentary on the Conflict of Laws, § 9.2A (1980); Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 95-128 (1976); Leflar, *A Response from the Author*, 34 Ark. L. Rev. 243, 245-250 (1980); Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L. Rev. 185, 186-201 (1976); Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1587-1591 (1978); Reese, *Limitations on the Extraterritorial Application of Law*, 4 Dalhousie L.J. 589, 589-590 (1978).

The parties in the present appeal submitted the case as a due process question. Since we determine that the extraterritorial application of the Missouri service letter statute to the facts of this case violates due process, we need not and do not address the question under the Full Faith and Credit Clause.

It seems that the question has been answered by the Supreme Court in *Allstate Ins. Co. v. Hague, supra.* In *Hague,* the Court stated that

> for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interest, such that choice of its law is neither arbitrary nor fundamentally unfair.

101 S.Ct. at 640.

Hague is consistent with the Court's earlier legislative jurisdiction cases and its more recent decisions in the area of judicial jurisdiction.[3] The basic rule is the state whose law is chosen to control a case must have a substantial factual contact with the parties or the transaction giving rise to the litigation. Without sufficient contacts, the state has no legitimate interest in the outcome of the litigation. *See Allstate Ins. Co. v. Hague, supra,* 101 S.Ct. at 640; *Clay v. Sun Ins. Office, Ltd., supra,* 377 U.S. at 181-183; *Richards v. United States,* 369 U.S. 1, 15 (1962); *Home Ins. Co. v. Dick, supra,* 281 U.S. at 407-408. *See also* R. Leflar, American Conflicts Law § 58 at 112 (1977).

The Court's decisions can be explained on the basis of the contacts in each case. In *Yates* and *Dick,* the Court ruled that the states involved had only an insignificant contact with the parties or the cause of action and, therefore, application of the states' laws was unconstitutional. *Dick* says nominal residence alone is not enough. *Yates* says post-occurrence change of residence to the forum state alone is not enough. *See Allstate Ins. Co. v. Hague, supra,*

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3. Legislative jurisdiction does not denote simply the law-making power of a state; rather it refers to the power of a state to *apply* its laws to any given set of facts. Judicial jurisdiction, in contrast, is the power of a state to *try* a particular action in its courts.

101 S.Ct. at 639. On the other hand, the Supreme Court has found sufficient contacts to permit the extraterritorial application of the law of the forum state in a number of instances.

(1) When an employment contract was executed in California for work to be performed oustate and the employer, who was doing business in California, agreed to transport the worker outstate and bring him back again when the work was finished, California law was properly applied to a suit arising out of the employment relationship. *See Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

(2) When a District of Columbia company employed a D. C. resident to work in Virginia for a time certain, and when the employee commuted from his home to work and was classified by the company as an employee who performed electrical construction work in the District and its surrounding areas, the law of the District was properly applied to a dispute arising out of an accident that occurred in Virginia. *See Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

(3) When an insurance policy that was issued in Illinois guaranteeing nationwide coverage was coupled with property loss in Florida, the presence of the insurance company in Florida, and the plaintiff's residence in Florida, application of Florida law was permissible in a suit on the insurance contract. *See Clay v. Sun Ins. Office, Ltd., supra*, 377 U.S. 179.

(4) When a Wisconsin resident commuting to work in Minnesota on a daily basis was injured in a highway accident in Wisconsin, and when he later moved to Minnesota, Minnesota law was properly applied to a suit against an insurance company, present and doing business

in Minnesota. *See Allstate Ins. Co. v. Hague, supra,* 101 S.Ct. 633.

The Court's "significant contacts" analysis addresses the traditional concerns of due process: preventing unfairness to the parties and promoting healthier interstate relations. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-292 (1980); Martin, *Personal Jurisdiction and Choice of Law,* 78 Mich. L. Rev. 872, 879 (1980); Reese, *Legislative Jurisdiction,* 78 Colum. L. Rev. 1587, 1591-1592 (1978). When parties' expectations are rationally based upon one state's laws, or in the negative, when their rational expectations are *not* based upon the laws of some other state, it violates due process to breach those expectations by applying the unexpected law. When the forum's contacts with the parties or the transaction satisfy the Court's "significant contacts" test, however, it follows, necessarily, that no party may "reasonably" expect that the forum state's law cannot control the case. In such a situation, the forum state's *power* to apply its own law is unquestionable.[4]

The Court's "contacts" analysis cannot be explained by considerations of fairness to the parties alone. When a state's law is applied to a transaction with which the state has no significant contact, it infringes upon the legitimate interests that other states may have in the transaction; this infringement is not reasonable—in a due process sense—within the context of our federal system of government.

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4. Sufficient contacts constitutionally empower a state to apply its laws. Of course, general conflict of laws principles of the forum state may well dictate the application of another state's law. The Supreme Court has stated that "[w]here more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity." *Richards v. United States,* 369 U.S. 1, 15 (1962).

Cf. World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. at 291-292 (judicial jurisdiction); *Hanson v. Denckla,* 357 U.S. 235, 251 (1958) (judicial jurisdiction); *New York Life Ins. Co. v. Head,* 234 U.S. 149, 160-161 (1914) (legislative jurisdiction); *Alton v. Alton,* 207 F.2d 667, 677 (3rd Cir. 1953) (legislative jurisdiction), *vacated on mootness grounds,* 347 U.S. 610 (1954). *See generally* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law,* 62 Cornell L. Rev. 94, 95-97 (1976); Reese, *Legislative Jurisdiction,* 78 Colum. L. Rev. 1587, 1599-1607 (1978); Reese, *Limitations on the Extraterritorial Application of Law,* 4 Dalhousie L.J. 589, 593, 599-602 (1978); Note, *The Minnesota Supreme Court: 1979—Conflicts of Law,* 64 Minn. L. Rev. 1181, 1189-1191 (1980).

The relevant contacts in this case can be simply stated. The employment contract, *i.e.*, McCluney's promotion to vice president of plant operations, was arranged in North Carolina and Wisconsin; and it was performed in Wisconsin. At the time of performance, McCluney was a Wisconsin resident. At all times, Schlitz was a Wisconsin corporation. The termination of McCluney's employment occurred in Wisconsin. McCluney returned to North Carolina after his termination from Schlitz; it was while he was in North Carolina that he requested a service letter "in the form provided for" under Mo.Ann.Stat. § 290.140. After McCluney received his service letter from Schlitz, he moved to Missouri and instituted this action.

Apart from McCluney's post-termination move to Missouri, he had had no real contact with that state for five years. Schlitz closed its Kansas City plant in September, 1973, and sold the plant in December, 1973, nearly two years prior to McCluney's termination. Although Schlitz sells its beer f.o.b. Schlitz's plant dock to its distributors, and some of Schlitz's distributors are located in Missouri,

Schlitz has performed no manufacturing or processing operations in Missouri since September, 1973.

The Supreme Court has recently stated that a plaintiff's *bona fide* "post-occurrence" change of residence to the forum state is a relevant contact that must be assessed in determining whether a forum's application of its state law is constitutionally permissible. *Allstate Ins. Co. v. Hague, supra,* 101 S.Ct. at 643-644. The Court in *Hague,* however, reaffirmed the rule in *John Hancock Mutual Life Ins. Co. v. Yates, supra,* that post-occurrence change of residence alone is not sufficient to create a "significant contact." *Allstate Ins. Co. v. Hague, supra,* 101 S.Ct. at 639 & 643.

McCluney asserts that his original hiring in Missouri in 1956 constitutes a significant contact with the forum state. McCluney relies upon a recent Missouri appellate court decision that applied the service letter statute to an employment contract performed in part in Missouri and in part in several other states over a two-year period. In *Bliven v. Brunswick Corp.,* 575 S.W.2d 788 (Mo.App. 1978), the plaintiff was hired by the Brunswick Corporation to manage a bowling alley in Gladstone, Missouri. In the course of his employment, the plaintiff was transferred to a bowling alley in New Orleans, Louisiana, for five months; a bowling alley in Council Bluffs, Iowa, for two months; and a bowling alley in Wichita, Kansas, for eight months. The Missouri Court of Appeals ruled that the service letter statute applied to a discharge that occurred in Kansas.

McCluney's argument stands or falls upon his contention that the employment contract was originally entered into in Missouri in 1956, and thereupon became fixed and immutable. McCluney's "once a king always a king" argument is unpersuasive. Although it is not entirely clear from the court's opinion, it would appear that the plaintiff

in *Bliven* performed essentially the same employment function in each facility, and the court characterized the involuntary transfers as part and parcel of the original contract. Moreover, the short duration of employment in each facility highlights the transient nature of Bliven's employment for the fifteen months he worked outside Missouri. By contrast, we hold that McCluney's 1956 contract was discharged in 1970 when he accepted Schlitz's offer of a promotion to plant manager of the Winston-Salem Plant. That 1970 contract was, likewise, discharged when McCluney accepted Schlitz's offer of a promotion to vice president of plant operations in Wisconsin in 1975. The 1975 contract is twice removed from the original 1956 Missouri contract. Moreover, it is this twice removed contract upon which McCluney bases his severance pay claim; his contract claim is for six months salary of a corporate vice president in Wisconsin, not the plant manager's salary for Schlitz's defunct Kansas City plant. The simple fact that McCluney was originally hired in Missouri, in the light of his subsequent employment history with Schlitz, is not controlling. This suit is not upon a Missouri contract.

In the instant case then, there is only one relevant contact between the Missouri forum and this transaction: McCluney's post-termination change of residence to that state. Standing alone, that is not sufficient to permit Missouri law to affect a Wisconsin contract entered into between two Wisconsin residents and which is to be performed in Wisconsin. Neither party could reasonably expect that the Missouri letter statute would alter their employment contract. Moreover, the application of Missouri law to an employment arrangement which only has contacts in Wisconsin constitutes an infringement of the interest Wisconsin has in overseeing contractual arrangements entered into and performed within its territorial

boundaries. Accordingly, that portion of the judgment awarding McCluney $400,001 under the Missouri service letter statute must be vacated.[5]

III

After careful review of the trial transcript and the record of the district court, we are convinced that McCluney's contract claim was properly submitted to the jury. Schlitz central argument is that since the Creviston Memorandum was never formally recorded in its Policy Manual and never sent to McCluney through the company's normal channels, it could not form the basis of a contract claim suitable for jury consideration.

The record, however, clearly shows that the Creviston Memorandum was in fact a codification of the termination procedure that had been Schlitz's long established practice. The Creviston Memorandum was drafted with the consultation and approval of Schlitz's vice president of industrial relations, and it was sent to the brewery industrial relations managers for them to implement. The record supports McCluney's claim that the company's severance pay policy was known throughout the work place, and that the Creviston Memorandum itself was circulated among salaried personnel other than the brewery industrial relations managers. The trial court correctly submitted the severance pay claim to the jury and the evidence fully supports the jury's finding of liability.[6]

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5. Based upon our ruling, we need not and do not address Schlitz's alternative arguments relating to McCluney's service letter statute claim.

6. We have considered and rejected Schlitz's arguments regarding the trial court's admitting alleged hearsay testimony and other testimony without proper foundation. After a careful review of the record, we are convinced that the trial court correctly overruled Schlitz's objections.

That portion of the judgment below awarding damages on the basis of the Missouri service statute is vacated. That portion of the judgment awarding damages for breach of contract is affirmed. Each party shall bear its own costs.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I agree that the judgment for breach of contract should be affirmed. But because I believe that application of the Missouri service-letter statute to this case would not deprive Schlitz of property without due process of law, I respectfully dissent from Part II of the Court's opinion.

In *Allstate Ins. Co. v. Hague*, 101 S. Ct. 633 (1981), a motorcycle driven by a resident of Wisconsin was struck from behind by an automobile driven by another resident of Wisconsin. The accident occurred in Wisconsin. Ralph Hague, also a resident of Wisconsin and a passenger on the motorcycle, was killed. Hague's widow sued Allstate on a contract of insurance which had been delivered in Wisconsin. The Supreme Court held that the application of Minnesota law to the question of how to construe the insurance policy did not deprive Allstate of property without due process of law.[1] Hague had worked in Minnesota for 15 years before the accident, and commuted each day to his job in that State (though the accident did not occur while Hague was commuting to work). Allstate was at all times present and doing business in Minnesota (as, indeed, it was in Wisconsin). After the accident, but before bringing suit, Mrs. Hague moved to Minnesota.

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1. The Court also held that there was no violation of the Full Faith and Credit Clause, U.S. Const., Art. IV §1. Schlitz has not made a full-faith-and-credit argument in this case.

Four justices[2] took the view that these three contacts with Minnesota were sufficiently significant to allow the Minnesota courts to apply their own law without violating the federal Constitution. Mr. Justice Stevens, concurring in the judgment,[3] thought that "the plaintiff's post-accident move to Minnesota and the decedent's Minnesota employment"[4] were at best irrelevant. He voted to uphold the application of Minnesota law against the due-process challenge, however, because in his view that outcome did "not frustrate the reasonable expectations of the contracting parties,"[5] nor cause "unfair surprise to a litigant."[6]

Under the criteria either of the plurality opinion or the concurring opinion of Stevens, J., the relationship between Missouri and this case seems to me no more tenuous than the relationship between Minnesota and Mrs. Hague's case. In both cases there was a post-occurrence move of the plaintiff to the forum State. In neither case is it claimed that the move was for the purpose of securing either a particular forum or a particular rule of law. In both cases the corporate defendant did business in the forum State at all relevant times. It is true that Schlitz has done no manufacturing or processing in Missouri since 1973, but it has continuously had distributors and sales and marketing employees in Missouri. There can be no doubt that Schlitz is amenable to suit in Missouri, and it has never claimed to the contrary, not in the Circuit Court of Jackson County, Missouri, where this action was brought by McCluney, not in the District Court, to which

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2. Mr. Justice Brennan, joined by three other Members of the Court, announced the Court's judgment and delivered the plurality opinion.

3. 101 S. Ct. at 644.

4. *Id.* at 649-50.

5. *Id.* at 649.

6. *Id.* at 648.

Schlitz removed the case, and not in this Court.[7] And the employment relationship between McCluney and Missouri is much more relevant for choice-of-law purposes than the employment relationship between Hague and Minnesota. Hague's accident has nothing to do with his employment, and neither did his insurance policy. By contrast, the Missouri service-letter statute, as construed by the Supreme Court of Missouri, became part of McCluney's contract when he was employed by Schlitz in Missouri in 1956. See *Cheek v. Prudential Life Ins. Co.*, 192 S.W. 387, 393 (Mo. 1916), *aff'd after trial*, 259 U.S. 530 (1922).

The Court's conclusion that Missouri is without power to apply its statute to this case hinges on the theory that McCluney's original employment contract, under which he worked in Missouri for 14 years, from 1956 to 1970, was "discharged," *ante*, p. 11, when he moved to North Carolina to manage the Winston-Salem plant. With all deference, this argument seems to me rather artificial, the kind of thing lawyers and scholars think up after the fact, rather than a consideration actually present in the minds of the parties when McCluney decided to accept Schlitz's offers of promotion. At least some aspects of the employment relationship typically survive an employee's transfer from one city to another by a nation-wide corporate employer. In this case, for example, McCluney's right to severance

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7. Though the concepts of judicial jurisdiction (amenability to suit) and legislative jurisdiction (choice of law) are distinct, they are admittedly closely related. See the Court's discussion of the two concepts, *ante*, slip op. at 5-6. Some observations in the *Hague* plurality opinion apply here: "Here, of course, jurisdiction in the Minnesota courts is unquestioned, a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law." *Allstate Ins. Co. v. Hague*, *supra*, 101 S. Ct. at 642 n.23. "By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved." *Id.* at 642-43.

pay, which the Court upholds, although based on his rate of pay in his last position, the vice-presidency in Wisconsin, was also based on his almost 20 years of service with the company, most of which took place in Missouri. Probably neither Schlitz nor McCluney had any conscious intention with respect to the continued applicability of the Missouri service-letter statute when McCluney moved to North Carolina. I cannot see how any expectation of Schlitz would be disappointed by holding that the statute continued to be a part of the employment agreement. The statute in terms applies "[*w*]*henever* any employee of any corporation doing business in this state shall be discharged or voluntarily quit . . .," Mo. Ann. Stat. §290.140 (1975) (emphasis supplied). Schlitz was doing business in Missouri both when it hired McCluney, and when it fired him. It would be fanciful to contend that Schlitz somehow changed its position, with respect to potential future service-letter liability, when McCluney moved out of Missouri. The most telling fact of all, so far as fairness to Schlitz is concerned, is that it responded almost at once, and without a murmur, to McCluney's request for a service letter under Missouri law. Apparently the claim that Missouri law applied was no surprise to Schlitz at that point. It was not until the company was sued, consulted counsel, and began casting about for defenses, that Schlitz asserted that application of Missouri law was so unexpected as to be fundamentally unfair.[8]

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8. I have concentrated on the question of unfairness to Schlitz because the Court does not appear to contend that there would be any real encroachment on Wisconsin's interests in applying Missouri law here. Wisconsin has no service-letter statute, but it does prohibit a combination of employers from acting to deny employment to persons seeking it, Wis. Stat. Ann. §134.02 (West 1974). Wisconsin is thus no more hospitable to blacklisting (the evil against which the service-letter statute is directed) than Missouri is. It simply chooses a different method to attack the problem. By contrast, in *Hague* Minnesota and Wisconsin had directly opposite rules of decisional law on the insurance question at issue, and still the application of Minnesota law was upheld.

The Court discusses two cases in which the Supreme Court has invalidated a state's choice of law. Both are crucially different from this case. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the parties had expressly contracted for the application of Mexican law, but Texas courts had attempted to apply Texas law. And in *John Hancock Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936), the only contact with the forum was the plaintiff's post-occurrence change of residence, and the Court struck down the application of Georgia law to an insurance policy which it construed to incorporate New York law as "a term of the contract . . . ." Here, on the contrary, Schlitz's and McCluney's original agreement included the Missouri statute, and no later agreement expressly modified that arrangement. Schlitz could have bargained with McCluney for an express choice-of-law clause to extinguish any potential service-letter liability. The lack of such an express choice-of-law agreement has been referred to by the Supreme Court as a factor supporting a forum state's choice of its own law. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964). I cannot help feeling that this Court's decision harks back to a day when the federal courts were too ready to enshrine their own notions of proper conflicts rules in the Due Process Clause of the Fourteenth Amendment. It may be significant that the Court cites no case (and I know of none in the Supreme Court) more recent than 1936 striking down a state's choice of law under the federal Constitution.

In sum, I would affirm the District Court's decision that the Missouri service-letter statute may validly be applied, and the judgment on Count II of the complaint, but only to the extent that it awarded nominal damages of $1.00. I cannot bring myself to approve the award of $400,000.00 in punitive damages on these facts. The service

letter, though false, was not defamatory, nor was it published by Schlitz to anyone except the plaintiff himself. McCluney's actual damages are covered by the judgment on Count I. The award of punitive damages is so large that it seems to have been the product rather of anger than of properly righteous indignation. Thus, although I differ from the Court's legal analysis, I agree with all but one dollar of the result.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Filed November 1, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0707-CV-W-5

FORREST McCLUNEY,
Plaintiff,

vs.

JOSEPH SCHLITZ BREWING CO.,
Defendant.

ORDER

Presently pending before the Court is defendant's October 11, 1978, Motion for Partial Summary Judgment. Defendant seeks through this motion an order of the Court dismissing Counts II and III of plaintiff's Complaint. The Court notes that in a letter addressed to the Court on October 26, 1979, counsel for the plaintiff indicates that he has no objection to the entry of a summary judgment order on Count III, preserving of course plaintiff's right to appeal from such a judgment. Accordingly, it is hereby

ORDERED that defendant's Motion for Partial Summary Judgment be, and is hereby, granted with respect to Count III of plaintiff's Complaint.

The Court, however, after giving due consideration to defendant's Suggestion in Support of the Motion for Partial Summary Judgment, and plaintiff's Suggestions in Opposition thereto, has decided to deny defendant's Motion for

Partial Summary Judgment with respect to Count II of plaintiff's Complaint. It is, therefore,

ORDERED that defendant's Motion for Summary Judgment on Count II of plaintiff's Complaint be, and is hereby, denied.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Missouri
Date: Nov. 1, 1979

(Filed December 10, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0707-CV-W-5

FORREST McCLUNEY,
Plaintiff,

vs.

JOSEPH SCHLITZ BREWING COMPANY,
Defendant.

MEMORANDUM AND ORDER

The above-styled action was the subject of a pre-trial conference held on December 6, 1979. During this conference counsel for defendant stated that he believes there are some serious evidentiary questions in this case which should be resolved prior to the commencement of trial of this action. Defense counsel requested an opportunity to brief these issues so that the Court may, if it so chooses, rule on the admissibility of certain evidence before trial. Although counsel for plaintiff indicated he thought such pre-trial rulings were unnecessary, the Court ruled that the defendant could seek pre-trial rulings on those issues he deemed appropriate. It was thereupon agreed that defendant would submit a brief on potential evidentiary problems on or before December 21, 1979, and that plaintiff would file a response thereto on or before January 2, 1980.

At this pre-trial conference counsel for the parties mutually agreed that any evidence concerning charges of sex discrimination brought by plaintiff against defendant is irrelevant to this action. The Court was therefore requested to enter an order prohibiting the parties from attempting to introduce any evidence concerning alleged sex discrimination by the defendant. The Court agreed to enter such an order.

Counsel for plaintiff orally moved the Court during this conference to permit plaintiff to amend the prayer for punitive damages contained in Count II of plaintiff's complaint. Plaintiff had previously filed a motion for leave to file a first amended complaint on June 30, 1978, which would have increased the prayer for punitive damages in Count II of plaintiff's complaint from $100,000.00 to $1,000,000.00. In an order issued on July 31, 1978, Chief Judge John Oliver denied plaintiff's motion without prejudice to its renewal at the final pre-trial conference. Plaintiff renewed his motion to raise his prayer for punitive damages from $100,000.00 to $1,000,000.00 at this conference and the Court granted his motion.

At the behest of defense counsel, the Court clarified its position on whether Wisconsin or Missouri law controls plaintiff's cause of action. The Court reaffirmed its previous ruling that Missouri law governs Count II of plaintff's complaint which alleges a violation of the Missouri Service Letter Statute. However, the Court ruled, and the parties agreed, that Wisconsin law controls Count I of plaintiff's complaint alleging breach of an employment contract.

In addition to the foregoing, it was agreed that the parties would be granted a period of ten (10) days in which to amend their lists designating their trial exhibits. Further, the parties were directed to submit their proposed

jury instructions and voir dire examination questions to the Court on or before January 9, 1980. Accordingly, for the reasons stated herein, it is hereby

ORDERED that the parties refrain from introducing or attempting to introduce at the trial of this cause any evidence concerning alleged sex discrimination by the defendant. It is further

ORDERED that Count II of plaintiff's complaint be, and the same is hereby, amended to increase the plaintiff's prayer for punitive damages from $100,000.00 to $1,000,000.00. It is further

ORDERED that the parties be, and are hereby, granted ten (10) days from the date of this order to file their amended lists designating their trial exhibits. It is further

ORDERED that counsel for the parties submit for the Court's consideration their proposed jury instructions and voir dire examination questions on or before January 9, 1980.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Missouri
December 10, 1979.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1383
Semptember Term, 1980

Forrest McCluney,
Appellee,

vs.

Jos. Schlitz Brewing Co.,
Appellant.

Appeal from the United States District Court for the
Western District of Missouri.

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 1, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1383

FORREST McCLUNEY,
Plaintiff,

vs.

JOS. SCHLITZ BREWING CO.,
Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Forrest McCluney, the above named plaintiff, hereby appeals to the Supreme Court of the United States from the decision of the court of appeals, filed May 20, 1981, holding that the Missouri service letter statute was unconstitutionally applied in this case. Plaintiff's motion for rehearing was denied by the court on July 1, 1981.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

/s/ James C. Tilden
James C. Tilden
Linde Thomson Fairchild Langworthy
Kohn & Van Dyke
2700 City Center Square
P. O. Box 26010
Kansas City, Missouri 64196
(816) 474-6420
Attorneys for Forrest McCluney

Filed 8th day of September, 1981.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of this Notice of Appeal were mailed this 4th day of September, postage prepaid, to Paul Scott Kelly, Jr., Gage and Tucker, 2345 Grand Avenue, P. O. Box 23428, Kansas City, Missouri 64141, attorney for defendant, the only party required to receive service.

/s/ James C. Tilden
James C. Tilden

(Filed September 14, 1978)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0707-CV-W-1

FORREST McCLUNEY,
Plaintiff,

vs.

JOS. SCHLITZ BREWING CO.,
Defendant.

STANDARD PRETRIAL ORDER NO. 2

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 20 of this Court, IT IS ORDERED:

I. This is an action for money damages for breach of an alleged employment contract to pay termination benefits, violation of the Missouri Service Letter Statute, and libel. The pleadings which raise the issues are plaintiff's "Petition for Damages" and the "Answer of Defendant". Names used hereinafter shall include plaintiff, Forrest McCluney (sometimes referred to as "McCluney"), and defendant, Jos. Schlitz Brewing Co. (sometimes referred to as "Schlitz").

II. Federal jurisdiction is invoked upon the following ground:

Federal jurisdiction is invoked on the ground of diversity of citizenship pursuant to 28 U.S.C., Section 1332, in that plaintiff is a citizen of the State of Missouri, and defendant is a corporation duly organized and existing under the laws of the State of Wisconsin, with its principal place of business in a state other than the State of Missouri. The amount in controversy exceeds Ten Thousand Dollars ($10,000), exclusive of interest and costs.

III. The following facts are admitted and require no proof:

1. Plaintiff, Forrest McCluney, is a citizen of the State of Missouri.

2. Defendant is a corporation duly organized and existing under the laws of the State of Wisconsin, with its principal offices located in Milwaukee, Wisconsin. Schlitz is qualified to do business in the State of Missouri.

3. The amount in controversy exceeds Ten Thousand Dollars ($10,000) exclusive of interest and costs.

4. The plaintiff, Forrest McCluney, became an employee of the defendant, Jos. Schlitz Brewing Co., with the effective date of October 15, 1956.

5. Mr. McCluney had previously been employed by the Geo. Muehlebach Brewing Company as a vice president.

6. The Jos. Schlitz Brewing Co. had purchased the Muehlebach Brewing Company in 1956.

7. Mr. McCluney was initially employed by the Jos. Schlitz Brewing Co. as the Industrial Relations Manager for its Kansas City plant. The Kansas City plant was located at 316 Oak Street, Kansas City, Missouri.

8. Plaintiff's date of employment with Schlitz for purposes of vacation computation and severance pay, if by involuntary discharge, was January 19, 1955, the date he first was employed by Muehlebach Brewing. The parties make no admission as to the effective date for purposes of plaintiff's pension benefits.

9. On June 1, 1962, Mr. McCluney was promoted by the Jos. Schlitz Brewing Co. to plant manager for the Kansas City, Missouri plant of Schlitz.

10. On or about October 14, 1970, Mr. McCluney was promoted by the Jos. Schlitz Brewing Co. to plant manager for the Winston-Salem, North Carolina plant of Schlitz.

11. During the first part of May, 1975, Mr. McCluney met with Mr. Eugene Peters at the Hilton Inn in Winston-Salem, North Carolina.

12. At this time, Mr. Peters was the Executive Vice President of the Jos. Schlitz Brewing Co.

13. Mr. Peters inquired if Mr. McCluney would accept a promotion to become a vice president of Schlitz and be responsible for overseeing plant operations, including corporate staff responsible for plant operations.

14. Mr. Peters informed Mr. McCluney this position would require his moving to Milwaukee, Wisconsin, where the corporate offices were located.

15. Mr. Peters expressed concern about the operational problems that were currently being experienced by Schlitz in its plants.

16. Mr. Peters described certain changes he was considering in the organizational responsibilities of officers responsible for operational problems at Schlitz.

17. Mr. Peters informed Mr. McCluney that in the event he undertook this responsibility, he would receive a substantial increase in compensation.

18. Mr. McCluney, after considering the proposition, informed Mr. Peters he would accept the promotion if offered.

19. Mr. McCluney accepted the position for the challenge of the job, an opportunity to implement certain ideas, and a matter of pride.

20. On or about May 12, 1975, Mr. McCluney was elected a vice president of the Jos. Schlitz Brewing Co.

21. On or about May 14, 1975, Mr. McCluney reported for work at the corporate offices of the Jos. Schlitz Brewing Co. in Milwaukee.

22. Upon arriving at the corporate offices on or about May 14, 1975, Mr. McCluney contacted Mr. Peters in his office.

23. Shortly thereafter, Mr. Scoutten joined Mr. Peters and Mr. McCluney.

24. Mr. Scoutten was a retired officer of Schlitz and was currently working as a consultant to the Board of Directors.

25. Mr. Scoutten informed Mr. McCluney he was assigned an office in the Operations Department building of the Jos. Schlitz Brewing Co. complex in Milwaukee.

26. Mr. Scoutten explained to Mr. McCluney the fringe benefits available to officers of Schlitz.

27. Mr. McCluney was employed as the Vice President - Operations of the Jos. Schlitz Brewing Co. between May 12, 1975 and August 25, 1975.

28. Mr. McCluney told Mr. Scoutten that he would expect to transfer his former secretary, Mrs. Lois Rinne, from Winston-Salem to Milwaukee.

29. Mr. Scoutten informed Mr. McCluney he would need to discuss this matter with Mr. Peters.

30. Mr. McCluney discussed with Mr. Peters on a number of occasions the possibility of transferring Mrs. Rinne.

30A. On Friday, August 22, 1975, Mr. Peters informed Mr. McCluney he would not transfer Mrs. Rinne to Milwaukee.

31. The basis of Schlitz's refusal to transfer Lois Rinne, the plaintiff's former secretary, from Winston-Salem to Milwaukee after plaintiff's promotion to Vice President - Operations, was company policy number 4 which prohibited the transfer of nonexempt employees. The term "nonexempt" has the same meaning in the company policy as that term is used under the wage and hour laws.

32. The formal management policies of Schlitz were formally adopted in written form and maintained in a loose-leaf binder as a "Policy Manual." Each management policy is assigned a number, shows the issue date, the effective date, the number of pages, is approved for issuance by the chief executive officer of Schlitz, indicates the additions or changes to the former management policy, and the date that the former policy was issued. An example is defendant's Exhibit 15.

33. The formal management policies were formally communicated to all employees and the current policies are maintained in the "Policy Manual," which is made available to all managers whose duties include implementa-

tion and administration of management policy. Such persons included the plant managers of the various plants and the officers of the company.

34. At the conclusion of the meeting between Mr. Peters and Mr. McCluney on Friday, August 22, 1975, Mr. Peters suggested McCluney give further consideration to the Rinne transfer over the upcoming weekend.

35. The following Monday, August 25, 1975, Mr. Peters inquired if Mr. McCluney had changed his mind concerning the transfer of Mrs. Rinne.

36. Mr. McCluney informed Mr. Peters that he had not.

37. It was Mr. McCluney's decision to insist upon the transfer of Mrs. Rinne to Milwaukee.

38. The termination of McCluney's employment with Schlitz occurred in Milwaukee, Wisconsin on August 25, 1975. The word "termination," when used in this order, shall encompass both involuntary discharge by the employer ("fired") and a voluntary resignation by an employee ("resigned").

39. The interoffice memo from R. L. Creviston dated July 11, 1975, entitled "Termination Procedure for Salaried Personnel," a true copy of which is Exhibit A to plaintiff's complaint, is the basis of plaintiff's contractual claim to severance pay. R. L. Creviston was defendant's director of personnel on July 11, 1975.

40. Immediately prior to McCluney's termination on August 25, 1975, McCluney was being paid an annual salary of Sixty-Five Thousand Dollars ($65,000).

41. On August 25, 1975, Schlitz published its "Management Bulletin," stating:

"Eugene Peters, executive vice president and general manager, has announced the appointment of Virgil J. Berry, Jr. to the position senior vice president—operations, replacing Forrest McCluney, who has resigned."

42. On August 26, 1976, Schlitz caused a news Release to be issued, stating:

"JOS. SCHLITZ BREWING COMPANY TODAY NAMED VIRGIL J. BERRY, JR., SENIOR VICE PRESIDENT - OPERATIONS, REPLACING FORREST McCLUNEY WHO HAS RESIGNED."

a. Similar statements, including the fact that McCluney "resigned" were contained within several newspapers, including:

(1) *The Wall Street Journal*, p. 8 (Aug. 27, 1975).

(2) *The Milwaukee Sentinel*, p. 9 (Aug. 27, 1975).

(3) *The Twin City Sentinel*, p. 21 (Aug. 28, 1975). Winston-Salem, North Carolina.

43. The news release was disseminated within the Jos. Schlitz Brewing Co. by the regular internal communication system.

44. The news release was disseminated to the news media and various governmental regulatory agencies having jurisdiction over one or more activities engaged in by the Jos. Schlitz Brewing Co.

45. On August 28, 1975, W. R. Young, Vice President of Industrial Relations for Schlitz, wrote to McCluney and enclosed a check in the amount of Five Thousand Five Hundred Thirty-Five and 98/100 Dollars ($5,535.98).

46. On September 6, 1975, McCluney returned the $5,535.98 check to Mr. Young along with a letter.

47. On September 11, 1975, William R. Young wrote a letter to Mr. McCluney in reply to his letter of September 6, 1975.

48. Mr. McCluney sent the Jos. Schlitz Brewing Co. a letter dated November 7, 1975, requesting a service letter as provided by Section 290.140, R.S.Mo. 1969.

49. A true copy of plaintiff's service letter request is attached to plaintiff's complaint and marked Exhibit B.

50. The Jos. Schlitz Brewing Co. responded to the McCluney letter dated November 7, 1975, by a letter dated November 18, 1975 from Joseph E. Dean, Jr., Senior Vice President and General Counsel.

51. A true copy of the defendant's reply to plaintiff's service letter request is attached to plaintiff's complaint and marked Exhibit C.

52. Mr. Dean stated in this November 18, 1975 letter that Mr. McCluney's employment as Vice President - Operations was terminated on August 25, 1975 by reason of his resignation.

53. With the possible exception of his attorneys and his wife, Mr. McCluney did not exhibit the letter dated November 18, 1975 from Joseph E. Dean, Jr. to anyone at any time.

54. The only statement in the service letter response claimed by plaintiff to be false is the statement that plaintiff had "resigned."

55. The defendant closed its Kansas City plant in September of 1973, sold the plant in December of 1973. Since September of 1973, the defendant has not performed any manufacturing or processing operations in the State of Missouri. Defendant sells beer F.O.B. defendant's plant

dock to its distributors, some of which are located in the State of Missouri.

56. After McCluney left the employment of Schlitz, the only firms he contacted concerning employment were the Brand Company, a management placement firm in Milwaukee, Wisconsin, Anheuser-Busch Company in St. Louis, Missouri, and National Can Company, Chicago, Illinois. The Brand Company did not arrange any job interviews between McCluney and prospective employers. Both Anheuser-Busch and National Can Company expressed interest in hiring McCluney. Anheuser-Busch discussed with McCluney possibilities of employment and ultimately offered him a position of employment as Industrial Relations Manager in a new plant they were opening on the west coast at a salary of $25,000.00 per year. McCluney did not accept this employment. A representative of National Can expressed an interest in keeping McCluney in the beer industry, but an offer of a position was never made. All of McCluney's attempts to seek employment occurred in the fall of 1975. Thereafter, he ceased seeking employment elsewhere and became self-employed.

57. On August 25, 1977, McCluney filed his Petition for Damages in the Circuit Court of Jackson County, Missouri, in three Counts, alleging breach of an employment contract, violation of the Missouri Service Letter Statute, and libel.

58. The summons was served on August 29, 1977.

59. On September 27, 1977, defendant caused plaintiff's action to be removed to the United States District Court, for the Western District of Missouri. On October 2, 1977, defendant filed its Answer to plaintiff's Petition for Damages.

IV. The reservations as to the facts recited in Paragraph III above are as follows:

1. By using the word "transfer" concerning the proposed move with Mrs. Rinne from Winston-Salem to Milwaukee (paragraphs III - 28, 30, and 31), plaintiff reserves the question as to whether such was limited to a physical move or included a promotion of Mrs. Rinne.

2. By admitting that management policy no. 4 was the basis of Schlitz for refusing to transfer Mrs. Rinne (paragraph 31), plaintiff does not admit that the policy was non-discriminatory as to women.

3. By admitting that the formal management policies of Schlitz are "adopted in written form and maintained in a loose-leaf binder as a 'Policy Manual' ", plaintiff reserves the question as to whether the Creviston memorandum on severance pay (plaintiff's Exhibit P. Ex. 6) was part of McCluney's employment contract.

4. By admitting that Schlitz "sells beer F.O.B. defendant's plant dock to its distributors," plaintiff reserves the issue of Schlitz doing business in the State of Missouri, and reserves the question of who (Schlitz or the distributor) suffers the risk of loss on beer after such leaves the dock of Schlitz.

V. The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

1. There have been no instances, with the exception of a plant closing, where a nonexempt employee has been transferred to another location where the employee remained a nonexempt employee, although there have been occasions where a nonexempt employee has been promoted to an exempt status and then transferred to another location where he performed the duties of the exempt position in which he was promoted.

2. McCluney was never refused employment anywhere by reason of the statement made by Schlitz in its response to the Service Letter request or its press release that McCluney had resigned his employment with Schlitz.

VI. The following issues of facts, and no others, remain to be litigated upon the trial:

1. Whether Schlitz was doing business in the State of Missouri in August, 1975.

1A. Whether McCluney was free to accept or reject the various promotions he received during his employment with Schlitz, and if rejected, whether he would continue in his current job classification.

2. Whether McCluney's employment with Schlitz was terminated by his voluntary resignation or by an involuntary discharge.

3. What was the amount of McCluney's unused vacation pay as of August 25, 1975.

4. Assuming, *arguendo*, that McCluney's employment with Schlitz was terminated by an inv luntary discharge, whether, under the terms of his employment, he was entitled to severance pay, and if so, the amount thereof.

5. The extent, if any, McCluney had any contact with the State of Missouri in the discharge of his employment duties at Schlitz after October 14, 1970, when he was transferred to the Winston-Salem, North Carolina plant.

6. Whether the November 18, 1975 letter from Schlitz in response to McCluney's letter dated November 7, 1975 set forth truly and correctly the cause of McCluney's termination.

7. Assuming, *arguendo*, that the November 18, 1975 letter from Schlitz to McCluney did not truly and correctly state the cause of McCluney's termination.

a. The amount of actual damage directly suffered by McCluney from this letter.

b. Whether the reply was made in a willful, wanton and malicious manner, or was made with a reckless disregard for plaintiff's rights, and if so, the amount of punitive damages, if any, to which McCluney is entitled.

8. Whether the publications stating McCluney "had resigned" were true or false, and if false, were the publications made recklessly with regard to their truth or falsity.

9. Were the publications received in such a context as to create a libelous innuendo.

10. Whether the statement that McCluney "had resigned" deprived him of the benefits of public confidence or social association, or harmed his reputation by lowering him in the estimate of the community or deterring third parties from dealing with him.

11. The amount of actual damages, if any, directly caused by the publication that McCluney "had resigned."

12. Whether the publications that McCluney "had resigned" were made maliciously or with knowledge of its falsity, or with a reckless disregard of whether it was false or not, and if so, the amount of punitive damages, if any, to which plaintiff is entitled.

VII. The exhibits to be offered at trial, together with a statement of all admissions by and all issues between the parties with respect thereto are as follows:

The exhibits to be offered at trial consist of the exhibits previously listed pursuant to Standard Pretrial Order #1 by plaintiff and defendant and any supplements thereto.

As used in this order, authenticity means the document is what it purports to be, e.g., a letter or memorandum, and by admitting authenticity, the parties do not waive other objections as to the admissibility of the document as evidence, such as that the document is not a business record and, therefore, is not admissible under an exception to the hearsay rule.

Plaintiff admits the authenticity of defendant's exhibits 1, 2, 3, 4, 5, 6, 7, 10, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 40, 43, 45, 47, 48, 49, and 51, but reserves all objections as to relevancy and materiality.

Plaintiff admits the authenticity of defendant's exhibits 8, 12, 13, 14, 22, 32, 33, 39, 41, 42, 44, 46, 50, 52, 53-59, but reserves all objections as to relevancy, materiality and hearsay.

Plaintiff admits the authenticity of defendant's exhibits 9 and 11.

Plaintiff is unable to authenticate plaintiff's exhibits 6 through 70, and 71 through 78, insofar as he does not have a copy thereof. If before the time of trial, plaintiff is furnished a copy of these exhibits, his best efforts will be made to authenticate the same. Presently, all objections as to relevancy, materiality, hearsay and opinion testimony are reserved.

Defendant admits the authenticity of plaintiff's exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 17, 18, 19, 22, 24, 33, 34, 35, 51, 52, and 53, but reserves all objections as to relevancy and materiality.

Defendant admits the authenticity of plaintiff's exhibits 7, 13-16, 21, 23, 25-32, but reserves all objections of relevancy, materiality and hearsay.

Defendant admits authenticity of plaintiff's exhibits 36-50, but reserves all objections as to competency, relevancy, materiality, hearsay and opinion testimony.

Defendant is unable to authenticate plaintiff's exhibit 54 insofar as it does not have a copy thereof. Defendant will, prior to trial, make its best effort to authenticate plaintiff's exhibit 54 if it is furnished a copy thereof.

VIII. The following issues of law, and no others, remain to be litigated upon the trial:

1. What were the terms and conditions of the employment between McCluney and Schlitz.

2. Did Schlitz breach the terms and conditions of employment between it and McCluney.

3. What damage, if any, was directly caused by the alleged breach of the employment relationship.

4. What is the amount of damage, if any, caused by the alleged breach of the employment relationship between McCluney and Schlitz.

5. Was Section 290.140 R.S.Mo. 1969 applicable to the termination of McCluney's employment with Schlitz.

6. Was the response by Schlitz to the November 7, 1975 letter from McCluney a violation of Section 290.140 R.S.Mo. 1969.

7. Did the November 18, 1975 letter from Schlitz cause McCluney damage.

8. What is the amount of damage, if any, caused by the November 18, 1975 letter.

9. Is McCluney entitled to punitive damages under Section 290.140 R.S.Mo. 1969.

10. What is the amount, if any, of punitive damages to be awarded McCluney under Section 290.140 R.S.Mo. 1969.

11. Were the publications that McCluney had resigned capable of a libelous connotation or were such reasonably capable of being understood in a defamatory manner.

12. Were the publications that McCluney had resigned received in a context as to infer reasonably a libelous innuendo.

13. Were the publications that McCluney had resigned made in a sufficiently reckless manner as to sustain an award of damage.

14. Did the publication that McCluney had resigned cause compensable damage.

15. Did Schlitz make the publication with actual malice or a reckless disregard of its falsity so as to sustain an award of punitive damage.

16. What amount, if any, of punitive damages is McCluney entitled to by reason of the publications that he resigned.

17. Is any or all of the claims of McCluney barred by an applicable statute of limitations.

18. What is the applicable law governing the plaintiff's claim, i.e. Wisconsin or Missouri.

IX. The foregoing admissions having been made by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice, or to implement Rule 26(e), F.R.Civ.P.

DATED: September 13th, 1978.

/s/ John W. Oliver
Chief, United States District
Judge

Approved As To Form and Content:

/s/ J. Michael Vaughan
Attorney for Plaintiff

/s/ Paul Scott Kelly, Jr.
Attorney for Defendant

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1765

Jerry N. Rimmer,
Appellant,

v.

Colt Industries Operating Corporation,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 19, 1981
Filed: August 11, 1981

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

We are asked to decide whether the Missouri service letter statute[1] violates the First and Fourteenth Amend-

1. The statute provides in relevant part:

Whenever any employee of any corporation doing business in this state shall be discharged or voluntary quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service.

Mo. Ann. Stat. § 290.140 (Vernon).

ments to the United States Constitution. The Missouri Supreme Court has very recently sustained the statute against a similar challenge.[2] The United States District Court for the Western District of Missouri ruled that the statute is unconstitutional.[3] *Rimmer v. Colt Indus. Op. Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980). We agree with the Supreme Court of Missouri and reverse the judgment of the district court.

I

Jerry Rimmer, a Missouri resident, was formerly employed as a district sales manager by the Holley Carburetor Division of Colt Industries Operating Corporation. Colt is a Delaware corporation doing business in Missouri; its principal place of business is New York. Rimmer began working for the Holley Carburetor Division of Colt in May, 1976. On October 2, 1977 he was orally notified that his employment would be terminated effective October 31, 1977. He was given no reason for the discharge.

On October 11, 1977, Rimmer's attorney sent a letter to a Vice President of the Holley Division. That letter requested that Rimmer be retained in his position and that Holley promptly furnish Rimmer with a letter signed by a superintendent or manager in charge setting forth the nature and character of the service rendered by Rimmer, the length of time for which Rimmer had worked at the Holley Division, and a true statement of the reason Holley might have for the discharge.

On January 23, 1978, Rimmer personally wrote to Holley and essentially reiterated the earlier request of his

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2. *Hanch v. K.F.C. Nat'l Management Corp.*, 615 S.W.2d 28 (Mo. 1981) (*en banc*).

3. The United States District Court for the Eastern District of Missouri reached the contrary conclusion in *Young v. A-T-O, Inc.*, 484 F. Supp. 626, 627 (E.D. Mo. 1980).

attorney. Receiving no reply to either letter, Rimmer filed suit against Colt in the Circuit Court of Jackson County, Missouri, on February 3, 1978, alleging a violation of the Missouri service letter statute. Colt removed the case to federal district court on April 3, 1978, and four days later responded to Rimmer's service letter request.

Colt's service letter stated that Rimmer's poor job performance was the true reason for his termination. The letter was quite explicit in detailing alleged deficiencies in Rimmer's work. The letter also noted that Rimmer had been offered two other positions with Holley but had not shown an interest in either because they necessitated his relocation.

Rimmer's amended complaint alleged that Colt's failure to respond to Rimmer's request within a reasonable time violated the statute, and that when Colt did respond, the reasons stated in the letter were not the true reasons for his discharge. Rimmer alleged that he was discharged because he would not accept a job transfer to Michigan when Colt had requested him to. He prayed for actual and punitive damages of $1,060,000.

Colt's answer denied Rimmer's allegations and interposed the affirmative defense that the service letter statute was unconstitutional. Thereafter, Colt filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court granted Colt's motion, finding the service letter statute to be violative of the "free speech" provision of the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Since the district court dismissed Rimmer's case on the pleadings, we must assume that all of the well pleaded factual allegations in Rimmer's amended complaint are true, and all contravening assertions in Colt's answer are assumed to be false.

See e.g., Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 468 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977). Accordingly, for the purpose of our review we assume as undisputably true: (1) the reasons for discharge stated in Colt's letter are false; and (2) Colt knew when it issued the letter that they were false—it intentionally, wantonly and maliciously issued a false service letter.

II

The district court found that the service letter statute permits the recovery of damages against an employer without proof of fault, and that it permits the recovery of punitive damages without a showing of actual malice. It reasoned that since corporations have the same "free speech" rights as individuals, the First Amendment protects the private expressions of a corporation from state infringement. It further reasoned that the service letter statute must be judged by the standard established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It interpreted *Gertz* as holding that (1) states may not impose liability for defamation without a showing of fault, 418 U.S. at 347, and (2) punitive damages cannot be recovered in such an action unless liability is "based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. Having construed the statute in the manner set forth above, the district court concluded that the Missouri service letter statute could not withstand the scrutiny of *Gertz*. There was no occasion for the district court to determine in this case that the service letter statute is to be interpreted in the manner it sets out. For as we have already indicated, it was obligated to assume that the reasons stated in the letter for the discharge were false, that Colt knew they were false, and nonetheless wantonly and maliciously issued the letter. Given these assumptions, we have no hesitancy holding that the service letter statute can be

constitutionally applied to Colt. We do not decide the issue whether the service letter statute would be constitutional if it imposed liability without fault or permitted the recovery of punitive damages without a showing of actual malice. We can decide that question when it is properly before us. Moreover, we do not necessarily agree with the district court's view that the Missouri Supreme Court has decided these issues in the way the district court determined it [illegible]. We read *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 19[illegible] (Mo. 1972) and *Roberts v. Emerson Electric Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960) more narrowly than the district court, particularly in light of the recent Missouri Court of Appeals decision in *Newman v. Greater Kansas City Baptist Hosp. Ass'n*, 604 S.W.2d 619 (Mo. App. 1980). *See also Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Howe v. St. Louis Union Trust Co.*, 392 S.W.2d 625 (Mo. 1965); *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960); *Holcroft v. Missouri-Kansas-Texas R. Co.*, 607 S.W.2d 158 (Mo. App. 1980); *Terranova v. Western Auto*, 589 S.W.2d 362 (Mo. App. 1979). We turn then to the much simpler questions that are properly before us.

A

Gertz v. Robert Welch, Inc., supra, poses no problem concerning the constitutionality of the service letter statute as applied in this case. *Gertz* permits states to impose liability for defamation upon a showing of fault, and it also permits the recovery of punitive damages with a showing of actual malice.[4]

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4. The appellant contends that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) only concerns "defamation" actions involving "media" defendants, and thus does not control this case. It is a question that has generated much discussion by the courts and the commentators. *See e.g., Jacron Sales Co. v. Sindorf,*

(Continued on following page)

Appellee's contention that the statute is unconstitutional because it permits the recovery of nominal damages without proof of actual pecuniary injury is without merit. The Missouri courts have never presumed substantial actual damages in a service letter action. The Missouri Supreme Court has, however, recognized that an employer's failure to comply with the statute does constitute "an invasion of plaintiff's legal rights" thus entitling him to nominal damages without proof of actual injury. A nominal recovery is limited to $1. *See e.g., Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 207 (Mo. 1972); *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980, 985 (Mo. App. 1952). Awarding nominal damages as a means of vindicating the legal right that was lost is a common law tradition squarely cemented in American jurisprudence. Allowing such a recovery certainly does not render the statute unconstitutional. *See generally Carey v. Piphus*, 435 U.S. 247 (1978); D. Dobbs, *Remedies*, § 3.8 (1973).

B

The district court, moreover, erred in holding that false statements made by corporate employers in service letters

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Footnote continued—

276 Md. 580, 350 A.2d 688 (1976); *Calero v. Del Chemical Corp.*, 68 Wis.2d 487, 228 N.W.2d 737 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex.L.Rev. 199 (1976); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349 (1975); Frakt, *Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut-Cam.L.J. 471 (1975); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. Cal.L.Rev. 902 (1974).

Since we determine that the *Gertz* standard is not violated here, we need not and do not determine whether that standard necessarily applies outside defamation actions involving non-media defendants.

are protected from state regulatory infringement by the First and Fourteenth Amendments. The trial court's reliance upon *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), and *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), as support for its holding is misplaced. In *First Nat'l Bank*, the Supreme Court held that speech that would otherwise be within the protection of the First Amendment does not lose that protection simply because its source is a corporation. 435 U.S. at 784.[5] In *Givhan*, the Court held that a public employee does not forfeit his First Amendment protections when he arranges to communicate privately with his employer rather than to express his views publicly. 439 U.S. at 414.[6] Neither of these cases compel the district court's broad based conclusion that blanket coverage ought to be extended to all corporate expressions, including admittedly false state-

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5. In *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court struck down a state statute that made it a crime for banking associates to make expenditures "for the purpose of * * * influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768. The statute specifically forbade banks from speaking out on a referendum issue concerning the taxation of individuals. The Court characterized the forbidden speech as a matter of public concern, and noted that in the bank's view "the enactment of a graduated personal income tax, as proposed * * * by the constitutional amendment, would have a seriously adverse effect on the economy of the State." *Id.* at 776. The Court concluded that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Id.* at 777.

6. In *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), the Supreme Court vacated the judgment of the United States Court of Appeals for the Fifth Circuit that a school teacher whose employment was terminated because she had "privately expressed her complaints and opinions to the principal" was not protected speech under the First Amendment. *Id.* at 413. The school teacher was dismissed for approaching the school principal and complaining about employment policies and practices at the school that she perceived as racially discriminatory. The Court determined that this was protected speech. *Id.*

ments. Neither decision shields corporations from state statutes that require them to make truthful statements, or otherwise require action from corporate employers that effectuate legitimate legislative goals. There are numerous statutes that similarly, and nevertheless constitutionally, restrict the "free speech" rights of corporate employers. *See e.g.*, National Labor Relations Act, § 8(c), 29 U.S.C. § 158(c) (1976) as construed in *N.L.R.B. v. Gissell Packing Co.*, 395 U.S. 575 (1969); Employee Retirement Income Security Act, 29 U.S.C. § 1132(c) (1976); Missouri Workers' Compensation Act, Mo. Ann. Stat § 287.380 (Vernon Supp. 1981).

The service letter statute was intended to protect certain economic and social interests of the State of Missouri. In *Cheek v. Prudential Ins. Co.*, 192 S.W. 387 (Mo. 1916), the Missouri Supreme Court held that the service letter statute was constitutional. The Court described the statute as one "enacted for the protection of the public, and for the benefit of the employe[e]s of corporations * * *." *Id.* at 390. That Court explained that the state through enacting the statute sought to assure that a worker's ability to sell his skills to a potential employer would not be hampered by a previous employer's refusal to truthfully describe his work history. The statute also sought to enable potential employers "to ascertain the degree of * * * intelligence * * * honesty, capacity and efficiency" of job applicants. *Id.* at 389.

The United States Supreme Court affirmed the reasoning of the Missouri Supreme Court that the goals of the service letter statute were legitimate constitutional concerns. In *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922), the Court stated:

> [T]he right to conduct business in the form of a corporation, and, as such, to enter into relations of em-

> ployment with individuals, is not a natural or fundamental right. It is a creature of law; and a state, in authorizing its own corporations or those of other states to carry on business and employ men within its borders, may qualify the privilege of imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.
>
> The statute in question is of this character; in it the legislature has recognized that, by reason of the systematic methods of engaging and dismissing employees that employing corporations themselves established, "letters of dismissal" * * * are not only customary, but a matter of necessity to those seeking employment, as well as to the corporations themselves * * *.

Id. at 536-37.

The statute attempts to regulate the issuance of reference letters because the state recognized that straightforward letters would benefit prospective employers and potential employees alike. Missouri has decided that a corporate employer has no right to lie about a former employee's job history. Indeed, it has an affirmative duty to tell the truth as it perceives it, so that both the buyer and seller of labor have sufficient information to purchase and sell employment services in the job market. Missouri punishes deceit, misrepresentation or overreaching on the part of corporate employers by permitting the recovery of money damages for the employer's failure to comply with the statute.

The Missouri Supreme Court recently reaffirmed its earlier decision in *Cheek, supra*. *Hanch v. K.F.C. Nat'l*

Management Corp., 615 S.W.2d 28 (Mo. 1981). There, the Missouri Supreme Court opined that the United States Supreme Court would not sanction false statements by an employer about an employee. *Id.* at 35-36 (citing *N.L.R.B. v. Gissell Packing Co.*, 395 U.S. 575 (1969); and *Bausch & Lomb, Inc. v. N.L.R.B.*, 451 F.2d 873 (2d Cir. 1971)). We conclude that the service letter statute as applied in this case does not unconstitutionally infringe a corporate employer's rights of "free speech", and that the statute is reasonably related to legitimate state interests.

III

The district court determined that since the statute only applies to corporate employers, it is violative of such corporate employers' right to equal protection of the law. In finding the service letter statute unconstitutional on equal protection grounds, the district court applied the compelling state interest test. Under this standard, the district court determined that "the distinction between corporate and non-corporate employers in the Service Letter Statute must be justified by a substantial governmental interest and * * * the distinction must be narrowly tailored to serve that interest."

While the district court recognized that both the United States Supreme Court and the Missouri Supreme Court found the service letter statute constitutional under the Equal Protection Clause, the lower court decided that the precedential value of those two cases was minimal because they were decided prior to the time that the First Amendment was applied to the states through the Fourteenth Amendment. The trial court ultimately found that none of the state interests served by the statute were compelling, or would otherwise justify the statute's classifying corporate employers only.

We have already held that the district court mischaracterized the rights of a corporate employer in a service letter action as "fundamental" First Amendment rights. The service letter statute is more properly characterized as economic or social legislation enacted for the general public welfare. The proper judicial standard of review for such legislation is the traditional rationality test. In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), the Court described the test in this manner:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions * * * our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

Id. at 303 (citations omitted).

Under this test, then, the question for the Court is whether the service letter statute is rationally related to a legitimate state interest. We have already answered this question in the affirmative. Moreover, the district court conceded that under this test the service letter statute passes constitutional muster.

IV

The district court also ruled that the statute was unconstitutionally vague when judged by the standard set out in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Initially, we question the lower court's strict application of the void of vagueness test to laws like the service letter statute. The service letter law was designed to regulate economic practices and not the free flow of ideas. The doctrine of void for vagueness is a mechanism generally used for protecting fundamental rights. The Supreme Court noted in *Papachristou* that "[i]n the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." 405 U.S. at 162. *See also Smith v. Goguen*, 415 U.S. 566, 573 & n.10 (1974).

When the service letter statute is properly viewed as a regulatory statute governing business activities, the appropriateness of strictly applying the vagueness doctrine is questionable. All that is required of this statute and its judicial construction is that it not be so vague that " 'men of common intelligence must necessarily guess at its meaning.' " *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). It is under this standard that we examine the district court's due process ruling.

First, the district court ruled that the service letter statute is unconstitutionally vague because it does not give corporations fair notice of when a service letter is required. The district court, emphasizing the inadequacies of the initial request made of Colt on October 11, 1977, stated that the facts of the present case are "an excellent example" of why the statute is vague in this respect. That court stressed that the October 11 letter: (1) was written

before, not after, the termination of Rimmer's employment; (2) was written by Rimmer's attorney, and not by Rimmer himself; (3) asked for the true reason for the notification of discharge rather than the true reason for discharge; and (4) asked for reinstatement as well as a service letter. Assuming, *arguendo*, that these facts obviated the issuance of a service letter, the district court failed to mention that the January 23, 1978 letter from Rimmer cured any alleged defects that the first request may have had. *Accord, Hanch v. K.F.C. Nat'l Management Corp., supra,* 615 S.W.2d at 34. Although Rimmer's letter did not ask for a service letter as such, he did request a letter setting out the constituent elements of the statute. This request fairly apprised Colt that a service letter was being requested. *See Brink's, Inc. v. Hoyt,* 179 F.2d 355, 360 (8th Cir. 1950). That is all that due process requires here.

Second, the district court ruled that the statute is unconstitutionally vague because it does not specify how quickly an employer must respond to a service letter request. The court noted that the Missouri courts have adopted a standard of reasonableness in determining when an employer must respond. The trial court felt, nevertheless, that the limits of reasonableness have never been specifically set and thus the statute fails the due process test. A "reasonable" time is a standard of time. Reasonableness is measured by the unique fact of each individual case. This standard may well be imprecise, but it is certainly comprehensible, and it passes constitutional muster here. *Accord, Hanch v. K.F.C. Nat'l Management Corp., supra,* 615 S.W.2d at 34.

Finally, the district court determined that the statute does not give corporations fair notice of what constitutes a proper response to a service letter request. The statute on its face clearly requires the corporate employer

to have the letter signed by a superintendent or manager; to set forth the nature, character and duration of the services rendered; and to state the true reason why the employee was discharged. In this regard we agree with the Supreme Court of Missouri:

> [I]t seems rather extreme to rule, because of the problems surrounding "one" letter, that the statute has not provided proper and sufficient guidance for corporate employers since the year 1905. We respectfully suggest that the statute is clear and concise in its dictates and any employer of reasonable intelligence would appreciate the obligations created by the statute.

Hanch v. K.F.C. Nat'l Management Corp., supra, 615 S.W.2d at 34.

V

For the reasons set forth above, we find that the district court erred in dismissing Rimmer's action on constitutional grounds. Accordingly, we reverse the order of the district court and remand the case for proceedings consistent with this opinion.

BRIGHT, Circuit Judge, concurring:

I concur in the result reached by the majority in this case, but write separately to express my views on the constitutionality of awarding punitive damages under the Missouri service letter statute.

The majority opinion assumes that Rimmer can recover punitive damages only by proving that "the reasons stated in the letter for the discharge were false, that Colt knew they were false, and nonetheless wantonly and maliciously issued the letter." Slip op. at 4-5. Based on this assumption, I join in the majority opinion I add a further

comment. I believe that the majority's standard for imposing punitive damages represents the minimum requirement for upholding the statute against attack on first amendment grounds.

For the reasons stated by Judge Collinson in *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217, 1222-25 (W.D. Mo. 1980), I agree that the service letter statute must be measured by the standard established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under the *Gertz* standard as applied to a service letter case, a plaintiff, to recover punitive damages, must prove by a preponderance of the evidence that an employer made a false statement, knowing it to be false or with reckless disregard for its truth. *Id.* at 349.

The Missouri courts, however, have not clearly articulated whether an award of punitive damages depends on such a showing of actual malice. *See Potter v. Milbank Manufacturing Co.*, 489 S.W.2d 197 (Mo. 1972); *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Newman v. Greater Kansas City Baptist and Community Hospital Association*, 604 S.W.2d 619 (Mo. Ct. App. 1980); *Rotermund v. Basic Materials Co.*, 558 S.W.2d 688 (Mo. Ct. App. 1977); *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (Mo. Ct. App. 1965). Unfortunately, the Missouri courts' uneven construction of the statute seems to place the corporate employer in the unenviable position of being liable for substantial punitive damages[1] even though the dis-

1. According to statistics compiled by the Greater Kansas City Jury Verdict Service, plaintiffs recovered a verdict in 100% of the reported cases, with an average punitive damages award of $117,000 in 1980, $150,000 in 1979, and $23,501 in 1978. A recent case in this circuit also illustrates the heavy damages awarded in service letter cases. In *McCluney v. Jos. Schlitz Brewing Co.*, No. 80-1383 (8th Cir. May 20, 1981), the employer furnished a service letter stating the employee had resigned.

(Continued on following page)

charged employee has not presented evidence that the employer wantonly or maliciously issued the service letter.

Under the pleadings and decision of this court, the plantiff will be required to prove actual malice to recover punitive damages. In my view, any less rigorous standard would offend the first amendment rights of an employer. *Gertz v. Robert Welch, Inc., supra.*

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Footnote continued—

The employee brought suit, claiming the employer's statement was false because he had in fact been fired. The critical question for the jury was whether McCluney resigned or was fired. The jury awarded $1 in actual damages and $400,000 in punitive damages. We reversed solely on the ground that Missouri law did not apply to the contract entered into in Wisconsin. This case also shows that substantial punitive damages may be awarded without requiring the plaintiff to prove actual injury. *Cf. Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1978) (no first amendment violation because California courts require a reasonable relationship between punitive and actual damages awarded).

Motion to Dismiss or Affirm

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-589

In the Supreme Court of the United States

October Term, 1981

FORREST McCLUNEY,
Appellant,

vs.

JOS. SCHLITZ BREWING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF APPELLEE JOS. SCHLITZ BREWING CO. TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution prevents the extra-territorial application of Mo. Rev. Stat. § 290.140 (1978), a Missouri statute regulating employment termination letters, to the termination in Wisconsin of a Wisconsin resident who was employed in Wisconsin by a Wisconsin corporation under an employment contract the parties have stipulated is controlled by Wisconsin law.

DESIGNATION OF CORPORATE RELATIONSHIPS

The Jos. Schlitz Brewing Co. has no parent companies, nor does it have any subsidiaries that are not wholly owned by it. An Agreement and Plan of Merger dated September 1, 1981 has been approved by the Boards of Directors of both Schlitz and the G. Heileman Brewing Co., subject to the approval of both companies' shareholders and the approval of appropriate regulatory agencies. Heileman's subsidiaries include G. Heileman Brewing Co., Inc.; Rainier Brewing Co.; Carling National Breweries, Inc.; G. Heileman Brewing Co. of Indiana, Inc.; Heileman Baking Co., Inc.; Dick Bros. Bakery Co., Inc.; Our Own Bakeries, Inc.; Machine Products Co., Inc. and Nesco Signs Corp.

CERTIFICATION PURSUANT TO SUPREME COURT RULE 28

This appeal is premised upon 28 U.S.C. § 1254(2), as the application of Mo. Rev. Stat. § 290.140 (1978) to this case has been held unconstitutional under U. S. Const. Amend. XIV. For this reason, and because of the further arguments contained in this motion, the Attorney General of the State of Missouri should be notified pursuant to 28 U.S.C. § 2403(b). Appellee is not aware of any prior notification in this cause.

TABLE OF CONTENTS

Question Presented I
Designation of Corporate Relationships II
Certification Pursuant to Supreme Court Rule 28 II
Table of Authorities IV
Opinions Below 1
Statement of Jurisdiction 2
Constitutional Provisions and Statutes Involved 2
Statement of the Case 2
Argument 8

I. It is manifest that the decision below rests upon a question that is unsubstantial and which requires no further argument 8

A. Appellant's Jurisdictional Statement raises only state law issues, presenting no substantial federal question for this Court's consideration 8

B. The decision below is in complete accord with the Due Process Clause 11

C. The decision below is in complete accord with Missouri choice-of-law principles and, thus, the decision should be affirmed on alternative grounds 17

D. By its own terms and as interpreted, the Missouri service letter statute has no extra-territorial effect and is therefore inapplicable, even assuming Missouri substantive law applies 20

E. Even if the service letter statute applies, the statute as applied in this case violates the First Amendment 23

Conclusion 29

Appendix—

Excerpt from Reply Brief of March 3, 1980 ..... A1

Excerpt from McCluney Brief before Eighth Circuit A3

McCluney's Motion to Strike before the Eighth Circuit A5

Eighth Circuit Order of July 31, 1981 ..... A7

N.C. Gen. Stat. § 14-355 (1969) A8

N.C. Gen. Stat. § 14-356 (1969) A9

Wis. Stat. Ann. § 134.02 (West 1974) A10

Excerpt from McCluney's Pretrial Brief of Plaintiff in District Court A12

Table of Authorities

CASES

Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924) 14

Alaska Packers Assoc. v. Industrial Acc. Comm'n, 294 U.S. 532 (1935) 16

Aldens, Inc. v. La Follette, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977) 15

Aldens, Inc. v. Miller, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 466 U.S. 919 (1980) 15

Aldens, Inc. v. Miller, 466 F. Supp. 379 (S.D. Iowa 1979), *aff'd*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 466 U.S. 919 (1980) 15

Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) 15

Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) 15

Aldens, Inc. v. Ryan, 454 F. Supp. 465 (W.D. Okla. 1976), *aff'd*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) 15

Allstate Ins. Co. v. Hague, ... U.S. ....., 49 U.S.L.W. 4071 (1981) 8, 9, 12, 13
Bigelow v. Virginia, 421 U.S. 809 (1975) 13, 14
Bliven v. Brunswick Corp., 575 S.W.2d 788 ((Mo. Ct. App. 1978) 22, 23
Booth v. Quality Dairy Co., 393 S.W.2d 845 (Mo. Ct. App. 1965) 11
Bubke v. Allied Building Credits, Inc., 380 S.W.2d 516 Mo. Ct. App. 1964) 11, 29
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 25
Chmielski v. City Products Corp., 71 F.R.D. 118 (W.D. Mo. 1976) 18
City of Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916) 10
Clay v. Sun Ins. Office Ltd., 377 U.S. 179 (1964) 16
Commercial Nat'l Bank v. Charlotte Supply Co., 226 N.C. 416, 38 S.E.2d 503 (1946) 9
Compton v. William Bros. Pipeline Co., 499 S.W.2d 795 (Mo. 1973) 27
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) 15
Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) 24, 25
Cordon v. Trans World Airlines, Inc., 442 F. Supp. 1064 (D. Kan. 1977) 21
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 24
Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975) 17
Eimer v. Texaco, Inc., 518 F.2d 807 (8th Cir. 1975) 26
Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938) 17
Estreen v. Bluhm, 79 Wis. 2d 142, 255 N.W.2d 473 (1977) 9

First American Nat'l Bank v. Automobile Ins. Co., 252 F.2d 62 (6th Cir. 1958) 15
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 24
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 25, 26, 27, 28
Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) 25
Hanson v. Denckla, 357 U.S. 235 (1958) 7
Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) 14
Havenfield Corp. v. H. & R. Block, Inc., 509 F.2d 1263 (8th Cir.), *cert. denied*, 431 U.S. 999 (1975) 18
Heuer v. John R. Thompson Co., 251 S.W.2d 980 (Mo. Ct. App. 1952) 11, 27
Hilton v. Guyot, 159 U.S. 113 (1895) 20
Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 14
Horstman v. General Elec. Co., 438 S.W.2d 18 (Mo. Ct. App. 1969) 21, 22, 23
Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) 17
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 17
Munford v. Wilson, 15 Mo. 540 (1852) 9
National Starch & Chem. Corp. v. Newman, 577 S.W.2d 99 (Mo. Ct. App. 1979) 18
New York Life Ins. Co. v. Miller, 139 F.2d 657 (8th Cir. 1944) 15
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 24, 28, 29
Nielsen v. Oregon, 212 U.S. 315 (1909) 14
Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968) 15
Osborn v. Ozlin, 310 U.S. 53 (1940) 14

Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939) 16
Poole & Kent Corp. v. C. E. Thurston & Sons, Inc., 286 N.C. 121, 209 S.E.2d 450 (1974) 9-10
Porterfield v. Burger King Corp., 540 F.2d 398 (8th Cir. 1976) 27
Potter v. Milbank Mfg. Co., 489 S.W.2d 197 (Mo. 1972) 26, 27
Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) 12
Reed, Roberts Associates, Inc. v. Bailenson, 537 S.W.2d 238 (Mo. Ct. App. 1976) 9
Rimmer v. Colt Indus. Operating Corp., 495 F. Supp. 1217 (W.D. Mo. 1980), *rev'd*, 656 F.2d 323 (8th Cir. 1981) 24
Rimmer v. Colt Indus. Operating Corp., 656 F.2d 323 (8th Cir. 1981) 25, 27
Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) 26
Simpson v. Union Oil Co., 411 F.2d 897 (9th Cir. 1969) 7
Singleton v. Wulff, 428 U.S. 106 (1976) 24
Smith v. Piper, 423 S.W.2d 22 (Mo. Ct. App. 1967) 11
State ex rel. Broglin v. Nangle, 510 S.W.2d 699 (Mo. 1974) 18, 19
Stephens v. Lever Bros. Co., 155 S.W.2d 540 (Mo. Ct. App. 1941) 29
Tattis v. Karthans, 215 So. 2d 685 (Miss. 1968) 20
Turner v. Turner, 242 N.C. 533, 89 S.E.2d 545 (1955) 9
Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954) 16
White v. Benkowski, 37 Wis. 2d 285, 155 N.W.2d 74 (1967) 11
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 14

Constitutional Provisions

U. S. Constitution, Amendment I 24, 25, 26, 27
U. S. Constitution, Amendment XIV 2, 15

Statutes

Fla. Stat. § 351.22 (1975) 13
Ind. Code §§ 22-6-3-1, 22-6-3-2 (1971) 13
Kan. Stat. § 44-808 (Supp. 1975) 13
Me. Rev. Stat. tit. 26, § 630 13
Mo. Rev. Stat. § 290.140 (1978) 2, 3, 13, 20, 22
Mont.. Rev. Codes Ann. § 39-2-801 13
N. C. Gen. Stat. §§ 14-355, 14-356 (1969) 2
Neb. Rev. Stat. §§ 48-209-211 13
Ohio Rev. Code §§ 4973.03, .05 13
Okla. Stat. tit. 40, § 171 (1971) 13
Wis. Stat. Ann. § 134.02 (West 1974) 2, 19, 20

Treatises and Other Authorities

6 A. Corbin, Corbin on Contracts § 1293 (1962) 10
Restatement (Second) of Conflict of Laws (1971) § 151 19
Restatement (Second) of Conflict of Laws (1971) § 196 19
Missouri Approved Instruction No. 23.08 (West 1981) 26
Missouri Approved Instruction No. 16.01 (West 1981) 28

No. 81-589

In the Supreme Court of the United States

October Term, 1981

FORREST McCLUNEY,
Appellant,

vs.

JOS. SCHLITZ BREWING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF APPELLEE JOS. SCHLITZ BREWING CO. TO DISMISS OR AFFIRM

May it please the Court:

The appellee Jos. Schlitz Brewing Co. respectfully moves the Court to dismiss the appeal for lack of jurisdiction or to affirm the judgment of the United States Court of Appeals for the Eighth Circuit previously entered in this action, for the reason that it is manifest that the question on which the judgment depends is so unsubstantial as to merit no further argument, and for the further reason that the decision below rests upon independent state law grounds. SUP. CT. R. 16.1.

OPINIONS BELOW

This is an appeal from the decision and judgment of the United States Court of Appeals for the Eighth Circuit vacating the trial court judgment in favor of the appellant McCluney. The opinions below are as set forth in appellant McCluney's Jurisdictional Statement and Appendix.

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in appellant's Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Fourteenth Amendment and Mo. Rev. Stat. § 290.140, as set forth in appellant's Jurisdictional Statement, other statutory provisions that may be pertinent are Wis. Stat. Ann. § 134.02 (West 1974) and N. C. Gen. Stat. §§ 14-355, 14-356 (1969). These are set forth in the Appendix hereto.

STATEMENT OF THE CASE[1]

This is an action for money damages for an alleged violation of Mo. Rev. Stat. § 290.140 (1978) (commonly known as the "service letter statute"), for common law libel, and for breach of an employment contract to pay termination benefits. Plaintiff-appellant Forrest McCluney ("McCluney") claims that defendant-appellee Jos. Schlitz Brewing Co. ("Schlitz") falsely stated that McCluney had resigned his employment, when in fact McCluney alleges that he was discharged. McCluney sought actual and punitive damages as a result of these alleged false statements, which were made in a "service letter" and in various publications. The termination benefits McCluney sought were based on

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1. Certain abbreviations are used throughout this motion. For the convenience of the Court and parties, McCluney's Appendix to the Jurisdictional Statement is cited "M. App. ....." and Schlitz's Appendix hereto as "S. App. ....." The parties' Standard Pretrial Order No. 2 is cited with a reference to "M. App. ....." where it has been reproduced, and with an appropriate paragraph number. Transcript citations have been retained as "Tr. ....." and the relatively few exhibit references have been retained for clarity in the unlikely event the record is transmitted.

the circulation of an interoffice memorandum to 15 Schlitz industrial relations managers in July of 1975. (M. App. 32). This memo was circulated while McCluney was employed in Milwaukee, and he claimed it became a part of his employment contract so as to entitle him to certain benefits. The libel claim was resolved adversely to McCluney and the termination benefits claim adversely to Schlitz. No review of these issues is sought before this Court, leaving only the service letter claim under Mo. Rev. Stat. § 290.140 (1978).

The origin of the instant controversy is the termination of McCluney's employment in Milwaukee, Wisconsin on August 25, 1975. Schlitz is a Wisconsin corporation, duly authorized and existing under the laws of the State of Wisconsin, with its corporate headquarters located in Milwaukee, Wisconsin. (M. App. 28). Schlitz at one time had manufactured beer in the State of Missouri, but had closed its Missouri plant in September of 1973. (M. App. 34-5, ¶ 55). Schlitz markets its beer F.O.B. its various plant docks through beer distributors, some of which are located in the State of Missouri. (M. App. 34-5, ¶ 55; Tr. 150). Since September of 1973, however, Schlitz has not performed any manufacturing or processing operations in the State of Missouri. (M. App. 34-5, ¶ 55).

McCluney, a lawyer by training (Tr. 151-52), first became a Schlitz employee in 1956 in Kansas City, Missouri. (M. App. 28, ¶¶ 4, 7). McCluney previously had been a vice president of the Muehlebach Brewing Company, which was acquired by Schlitz in that year. (M. App. 28, ¶¶ 5, 6). After the acquisition, McCluney became an industrial relations manager at Schlitz's Kansas City plant (M. App. 28, ¶ 7; Tr. 68), and was promoted to plant manager in 1962. (M. App. 29, ¶ 9). McCluney remained as plant manager until his next promotion in 1970. (M. App. 29, ¶ 10).

McCluney was promoted in 1970 to the position of plant manager in Winston-Salem, North Carolina. McCluney received this promotion on or about October 14, 1970 (M. App. 29, ¶ 10), when he was offered the position by his superior, Mr. Robert Bach. (Tr. 158). Bach offered McCluney the position at a plant managers' meeting in Milwaukee, Wisconsin, although McCluney did not immediately accept the offer. (Tr. 158). McCluney considered the offer of the promotion carefully, considering the advantages of staying in a small plant, his friends in the Kansas City area, the prospect of "pulling up stakes," and the relative tax situations. (Tr. 358-60). The Winston-Salem plant at that time had management trouble, and was considerably larger than the Kansas City plant. (Tr. 82). He ultimately agreed to accept the promotion, adding the condition that Schlitz provide a membership in a country club. (Tr. 159-61). McCluney was free to accept or reject the promotion. (Tr. 161). McCluney testified that, after he accepted that promotion, he never anticipated returning to run the Kansas City plant. (Tr. 232). McCluney remained in North Carolina for nearly five years until his next promotion in 1975. (M. App. 29, ¶¶ 10, 11).

McCluney's next promotion took him from North Carolina to Wisconsin as Vice President of Plant Operations at corporate headquarters in Milwaukee, Wisconsin, where he remained until the time of his termination. (M. App. 29, ¶ 27). McCluney was first offered this position in May of 1975, several months prior to his termination. (M. App. 30, ¶¶ 11-13). McCluney was approached regarding the promotion to vice president by Mr. Gene Peters, then the Executive Vice President of Schlitz. (M. App. 29, ¶ 12). The two men discussed the possible promotion during the first part of May, 1975 at the Hilton Inn in Winston-Salem, North Carolina. (M. App. 29, ¶ 11). Peters inquired if McCluney would accept a promotion to become a vice president of Schlitz and be responsible for oversee-

ing plant operations, including corporate staff responsible for plant operations. (M. App. 29, ¶ 13). Their conversation lasted approximately an hour (Tr. 158), during which Peters outlined operational problems being experienced by Schlitz and the changes Peters felt were necessary to remedy those problems. (M. App. 29, ¶¶ 15-16; Tr. 287, 284-86). Peters informed McCluney that the promotion would require McCluney to move to Milwaukee, Wisconsin, where Schlitz's corporate offices were located. (M. App. 29, ¶ 14). McCluney did not immediately accept the offer, but talked it over with his wife for a few days. (Tr. 91). McCluney considered the location of his friends, the prospect of "pulling up stakes," the advantages of staying in his present plant, and the relative tax situations of the different states. (Tr. 162, 159-161). He ultimately accepted the position for the challenge of the job, for an opportunity to implement certain ideas, and as a matter of pride. (M. App. 30, ¶ 19). McCluney was free to accept or reject the job, and would have remained as the plant manager in Winston-Salem if he had decided to reject it. (Tr. 162, 287). The job entailed a substantial increase in compensation, and McCluney was elected a vice president of Schlitz on or about May 12, 1975, reporting for work in Milwaukee a few days later. (M. App. 30, ¶¶ 17, 20, 21).

McCluney's termination of employment with Schlitz arose out of his desire to transfer his secretary, Lois Rinne, from Winston-Salem to Milwaukee. McCluney first raised the matter with Peters approximately one week after he arrived in Milwaukee (Tr. 166, 289), and discussed it with Peters on a number of occasions subsequently. (M. App. 31, ¶ 30; Tr. 175, 292-93). At the time he discussed the Rinne transfer with Peters, McCluney was aware that Schlitz had a formal Management Policy as part of its Policy Manual that would have prevented the transfer of his secretary. (Tr. 167). McCluney continued to bring

the matter up in conversations with Peters (Tr. 175, 292-93), and McCluney was told by Peters on Friday, August 22, 1975, that it would not be possible to transfer Mrs. Rinne. (Tr. 293-94). At that point, McCluney told Peters that if that was going to be the company's attitude, then there was going to "come a parting of the ways," which Peters interpreted to be a threat of resignation. (Tr. 294). Peters urged McCluney to reconsider over the weekend after discussing the matter with his friends, suggesting that McCluney had his "priorities mixed up." (Tr. 294).

The parties have stipulated that McCluney's employment with Schlitz terminated on the following Monday, August 25, 1975, in Milwaukee, Wisconsin. (M. App. 32, ¶ 38). This termination occurred in a meeting attended only by Peters and McCluney (Tr. 190), and was one of the central issues at trial. McCluney maintained he had been discharged during that meeting (Tr. 103-04), while Peters testified that McCluney had resigned. (Tr. 296-300).

Several months after his termination, on November 7, 1975, McCluney requested in writing "a Service Letter in the form provided for under V.A.M.S. 290.140." (P. Ex. 23). McCluney's stationery bore the address of his apartment in Winston-Salem, North Carolina, and McCluney testified that his legal residence was either in Winston-Salem or in Milwaukee. (Tr. 237). McCluney had purchased a condominium in Milwaukee prior to his termination and was preparing to move from North Carolina, but he and his wife had not yet moved their furniture and effects. (Tr. 163). Schlitz responded to McCluney's service letter request by mailing a service letter to McCluney in Winston-Salem from its offices in Milwaukee. (M. App. 34, ¶¶ 50-51; P. Ex. 24). The only statement in Schlitz's service letter response McCluney claims to be false is the statement that McCluney had "resigned." (M. App. 34, ¶ 54).

McCluney subsequently moved to Missouri and initiated this action on August 25, 1977, two years after his termination. The applicability of the Missouri service letter statute to McCluney's termination has been a central issue in this case since its inception, although the trial court ultimately rejected Schlitz's due process theory and other arguments.[2] The jury returned a verdict in favor of McCluney on his service letter claim for $400,000 in punitive damages and $1 in nominal actual damages. No substantial actual damages were recovered on the service letter claim because it was stipulated that McCluney did not show the service letter to anyone at any time, with the possible exception of his attorneys and his wife. (M. App. 34, ¶¶ 53; 37, ¶ 2). The Eighth Circuit vacated the service letter judgment because McCluney and Schlitz had no contact with Missouri for at least five years prior to the termination, and applying the Missouri statute under such circumstances violated the Due Process Clause.

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2. The application of the service letter statute was specifically raised in the parties' pretrial order, as was the issue of "what is the applicable law governing the plaintiff's claim, i.e. Wisconsin or Missouri." (M. App. 40-41). On post-trial motions, Schlitz again urged the inapplicability of the service letter statute, arguing in part that "a state's police power cannot extend into another state's sovereign territory any more than its taxing power can, for such an action would be an unconstitutional denial of due process of law," citing decisions of this Court. (S. App. 2). The issue was therefore timely raised. *Hanson v. Denckla*, 357 U.S. 235, 243 (1958). In a "Motion to Strike Issues Not Raised Below," McCluney unsuccessfully argued that Schlitz had not raised this issue in the trial court. (S. App. 5). The Eighth Circuit denied McCluney's motion without prejudice to arguing the matter before the panel (S. App. 7), but by not further briefing the matter McCluney abandoned the issue and cannot now resurrect it to overturn the Eighth Circuit. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1969).

ARGUMENT

I.

It is manifest that the decision below rests upon a question that is unsubstantial and which requires no further argument.

A. Appellant's Jurisdictional Statement raises only state law issues, presenting no substantial federal question for this Court's consideration. The stated jurisdictional basis for McCluney's appeal to this Court is 28 U.S.C. § 1254(2), coupled with McCluney's assertion that the Eighth Circuit erred by applying the Due Process Clause of the Fourteenth Amendment to restrict the extra-territorial application of a Missouri statute. To justify plenary review by this Court, McCluney attempts to argue that the question presented in this appeal "is substantial because it involves the extent to which a federal court of appeals may use . . . the Due Process Clause to control the application of a state's choice-of-law rules." Juris. Statement at 13. However, an examination of McCluney's Jurisdictional Statement reveals that it completely fails to demonstrate that the decision below is in any way a departure from prior decisions of this Court construing the Due Process Clause. In fact, the *only* Due Process case cited by McCluney is this Court's recent pronouncement in *Allstate Ins. Co. v. Hague*, ... U.S. ....., 49 U.S.L.W. 4071 (1981), a decision thoroughly considered by the Eighth Circuit in the decision below. McCluney cites no other decisions of this Court dealing with the Due Process Clause in his Statement of Reasons for Plenary Review.

Although McCluney argues that the instant decision represents a departure from *Hague*, McCluney's quarrel with the decision below is based solely upon state law grounds. McCluney argues that the Missouri contacts in

the instant action exceed the forum contacts present in *Hague*, and that the Eighth Circuit therefore erred in the instant action. The basis for McCluney's argument is his contention that there was but one employment contract in the instant action—a Missouri employment contract. In the decision below, the Eighth Circuit found that each of McCluney's several promotions involved separate employment contracts, each formed of different offers, bargaining, obligations, and acceptances, and that McCluney's prior employment contracts were discharged and replaced by subsequent ones. The major portion of McCluney's Statement of Reasons for Plenary Review is devoted to an attack upon the Eighth Circuit's handling of this issue of contract law, an issue that is purely a creature of state law. By attempting to convince this Court that the Eighth Circuit erred in applying the contractual doctrine of merger, McCluney would have this Court review the record and re-apply principles of state contract law to find a single employment contract. McCluney contends that this contract would be a Missouri contract, and that a departure from *Hague* would thereby emerge as a result of this additional, manufactured contact with Missouri. Thus, the linchpin of McCluney's appeal to this Court is an issue of state contract law which has already been thoroughly reviewed in the court below.[3]

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3. The state contract law issues were briefed and argued to the Eighth Circuit which correctly recognized that Missouri, North Carolina, and Wisconsin all apply the contractual doctrine of merger, thereby allowing contracting parties to alter and modify their relationship through mutual agreement. *Munford v. Wilson*, 15 Mo. 540 (1852); *Reed, Roberts Associates, Inc. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. Ct. App. 1976); *Estreen v. Bluhm*, 79 Wis. 2d 142, 255 N.W.2d 473 (1977); *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 545 (1955); *Commercial Nat'l Bank v. Charlotte Supply Co.*, 226 N.C. 416, 38 S.E.2d 503 (1946). The merger principle makes it clear that McCluney's contract is a Wisconsin contract, at best, incorporating a Wisconsin or North Carolina service letter obligation. *Poole & Kent Corp. v. C. E. Thurston & Sons, Inc.*, 286 N.C. 121, 209 S.E.2d 450, 455

(Continued on following page)

Aside from seeking to immerse this Court in purely state law issues, McCluney's appeal suffers from the additional defect of being flatly contrary to express findings and stipulations in the courts below. The Eighth Circuit specifically found that the employment contract at issue "was arranged in North Carolina and Wisconsin; and it was performed in Wisconsin." 649 F.2d at 582. This specific finding is amply supported by the record, as it has been stipulated that offer, bargaining, and acceptance occurred in North Carolina five years after McCluney had left Missouri, and that performance in Wisconsin was required. (M. App. 29-30). Moreover, when Schlitz raised the choice-of-law issues in the trial court, McCluney *stipulated* that his employment contract was to be considered *under Wisconsin law.* (M. App. 22) (S. App. 13). Of course, these stipulations were consistent with McCluney's theory used to obtain termination benefits in the courts below including severance pay based (1) upon the salary for his Wisconsin position and (2) upon the circulation of an interoffice memorandum in Wisconsin, which memorandum he contended became a part of his employment contract. Now, contrary to express findings and stipulations in the courts below, McCluney would have this Court re-decide these issues of state law and manufacture a Missouri contract and Missouri contact that is contrary to the record in this case. Under these circumstances, it is clear that McCluney's appeal raises no substantial question for this Court's consideration.

Finally, even were this Court to accept McCluney's invitation to venture into the state law contract issues

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Footnote continued—
(1974); *City of Milwaukee v. Raulf*, 164 Wis. 172, 159 N.W. 819 1916). (Both cases recognize that contracts entered into in the respective states incorporate relevant statutes). Obligations under the former contracts which are inconsistent with those of latter ones are discharged. 6 A. Corbin, Corbin on Contracts § 1293 p. 198 (1962).

and find a single contract, McCluney's service letter judgment still could not stand. Assuming *arguendo* the service letter statute became a part of a single Missouri employment contract, as McCluney argues, this could not sustain the punitive damage award because no punitive damages may be recovered for a breach of contract under either Missouri or Wisconsin law. *Smith v. Piper*, 423 S.W.2d 22 (Mo. Ct. App. 1967); *White v. Benkowski*, 37 Wis. 2d 285, 155 N.W.2d 74 (1967). Thus, McCluney's verdict stands or falls on the finding that *a statute*—not a contract—was violated in this case.

Such a finding is conceptually impossible because both McCluney and Schlitz had severed their relationship with Missouri years before the events occurred which would give rise to a violation of the service letter statute. Missouri law recognizes that an employee has no statutory right to a service letter until his employment has terminated, he requests one in writing, and a "reasonable time" has elapsed. *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980, 987 (Mo. Ct. App. 1952). *See also Bubke v. Allied Building Credits, Inc.*, 380 S.W.2d 516, 519 (Mo. Ct. App. 1964); *Booth v. Quality Dairy Co.*, 393 S.W.2d 845, 848 (Mo. Ct. App. 1965). All of these events happened in Wisconsin in 1975 when McCluney was a Wisconsin resident, *not* when McCluney was in Missouri five years earlier. In fact, McCluney conceded in briefing before the Eighth Circuit that his "termination itself may be conceded *to be a purely Wisconsin event*," (S. App. 3) (emphasis supplied), yet he still inconsistently maintains that the service letter rights allegedly arising out of that termination are governed by the law of Missouri.

B. The decision below is in complete accord with the Due Process Clause. The Eighth Circuit's decision in this case follows precisely the interpretation given to the Due

Process Clause in the Court's prior decisions.[4] The decision in *Allstate Ins. Co. v. Hague*, ... U.S. ....., 49 U.S.L.W. 4071 (1981), summarizes much of the law in this area, and squarely supports the Eighth Circuit's decision. In order for a state to constitutionally apply its law to a case, *Hague* holds that a state must have a significant contact or significant aggregation of contacts with the parties and transaction in question. 49 U.S.L.W. at 4074. Conversely, application of a state's law is unconstitutional if that state has only an insignificant contact with the parties and occurrence. *Id.*

In the present case, Missouri has no significant contact with the parties and transaction in question. There is no dispute that McCluney was employed in Wisconsin, and he has already conceded his termination "to be a purely Wisconsin event." (S. App. 3). *Hague* deemed the locus of an employment relationship to be "a very important contact" with the forum, yet that contact in the instant case is not with the forum but with Wisconsin. *Hague*, 49 U.S.L.W. at 4075. The second *Hague* contact is the defendant's forum presence and the forum's interest in regulating dealings with forum workers and residents, 49 U.S.L.W. at 4076, another factor absent here. Schlitz ceased its manufacturing and processing in Missouri in 1973, years before the event the service letter statute would regulate, and McCluney had not been a Missouri resident for five years. Missouri has no interest whatever in regulating one non-resident's post-employment dealings with another non-resident, where the locus of their

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4. The Missouri service letter statute has been upheld as a valid exercise of Missouri's police power. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922). Schlitz is not challenging Missouri's exercise of Missouri police power within its own territorial jurisdiction, the issue resolved in *Cheek*, but instead submits that it is a violation of the Due Process Clause of the Fourteenth Amendment for Missouri to apply its police power to employment relationships existing beyond its borders, as determined by the Eighth Circuit.

employment relationship is in another state. Application of Missouri law under such circumstances would clearly be "arbitrary" and "fundamentally unfair."[5] *Hague*, 49 U.S.L.W. at 4075. The only real contact with Missouri in this case is the third *Hague* contact, a post-occurrence change of residence. *Hague*, prior decisions of this Court, and the Eighth Circuit in this case have all held this contact to be insufficient. *Hague*, 49 U.S.L.W. at 4074, 4075. Thus, all material contacts with the parties and the transaction at issue are in Wisconsin. The Eighth Circuit was plainly correct in its application of the Due Process Clause.

The basis for *Hague* and other Due Process decisions is a recognition of a very basic principle of our federal form of government: That each state may regulate events and activities within its own borders, but that a state's police powers do not reach events and activities *beyond* its borders as they must be left for regulation by the other state or states involved. *See Bigelow v. Virginia*, 421 U.S. 809, 827-29 (1975). In *Bigelow*, a First Amendment case involving advertisement of abortions, the Court recognized that:

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5. In evaluating the fairness and foreseeability aspects of *Hague*, the majority and concurring opinions both properly observed that insurance policy "stacking" is the predominant state practice, and that automobile insurers could scarcely expect to control which state's law might govern in a particular case. 49 U.S.L.W. at 4075 n.22, 4078. In stark contrast, the Missouri service letter statute stands alone as the only such statute in the nation which, to Schlitz's knowledge, creates a private cause of action where liability is imposed without fault. In addition to Wisconsin and North Carolina statutes, contained in the appendix, at least nine other state service letter statutes exist. Most have no private cause of action at all, and only Missouri awards actual and punitive damages under circumstances such as the instant case. *Compare* Mo. Rev. Stat. § 290.140 (1978) *with* Fla. Stat. § 351.22 (1975); Ind. Code §§ 22-6-3-1, 22-6-3-2 (1971); Kan. Stat. § 44-808 (Supp. 1975); Me. Rev. Stat. tit. 26 § 630; Mont. Rev. Codes Ann. § 39-2-801; Neb. Rev. Stat. §§ 48-209-211; Ohio Rev. Code § 4973.03, .05; Okla. Stat. tit. 40, § 171 (1971).

> [T]he placement services advertised in appellant's newspaper [in Virginia] were legally provided in New York at that time. The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State.

Bigelow, 421 U.S. at 822-23 (footnotes omitted). More recently, the Court has observed that the Due Process Clause "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Due Process challenges to extra-territorial application of state statutes have been sustained by the Court in a number of different contexts involving the police power. *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (state statute abrogating limitations period in insurance contract could not be applied extra-territorially to contract and parties having no contact with state); *Nielsen v. Oregon*, 212 U.S. 315 (1909) (statute proscribing net fishing could not be extra-territorially applied to fishing in another state's waters in river forming common boundary); *cf. Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (denial of due process for state to attempt to tax corporate assets extra-territorially); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938) ("[A] state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."). *See also Osborn v. Ozlin*, 310 U.S. 53 (1940) (majority and dissent agree on due process violation through extra-territorial application of statutes; majority simply finds no

extra-territorial application exists); *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934) (state statute cannot be applied extra-territorially to abrogate contractual limitations period in contract having no relation to forum state). *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399 (1924) ("The Texas statute was incapable of being constitutionally applied to it, since the effect of such application would be to regulate business outside the state of Texas, and control contracts made by citizens of other states in disregard of their laws . . . ."). The Due Process violation caused by the extra-territorial application of state statutes has also been recognized in the various Circuits.[6]

A striking denial of due process becomes apparent when these principles are applied to the instant action. In the case *sub judice*, Missouri is not attempting to apply its statute to anything occurring in Missouri or to any transaction involving a Missouri resident. Missouri is not attempting to use its police power to regulate the quality

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6. *See Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert denied*, 466 U.S. 919 (1980); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978); *Aldens, Inc. v. La Follette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). The *Aldens* cases represent a wave of litigation that Aldens initiated in at least four different circuits claiming unsuccessfully that state consumer legislation was being applied extra-territorially in violation of the Due Process Clause. The respective circuits held that the respective states could apply their statutes to transactions with their own residents within their own borders, but that "[u]nquestionably, the Due Process Clause of the Fourteenth Amendment limits the power of a State to extend the effects of its laws beyond its borders." *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 472 (W.D. Okla. 1976), *aff'd*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978). *See Aldens, Inc. v. Miller*, 466 F. Supp. 379 (S.D. Iowa 1979), *aff'd*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 466 U.S. 919 (1980). *See also New York Life Ins. Co. v. Miller*, 139 F.2d 657 (8th Cir. 1944) (denial of due process to apply an Arkansas "vexatious delay" statute extra-territorially to insurance contracts having no relationship to Arkansas). *Accord, First American Nat'l Bank v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir. 1958).

or content of Schlitz beer sold in Missouri, nor is it seeking to protect the employment relationships or working conditions of Missouri workers. The Court has upheld application of a state statute providing for the welfare of employees temporarily working in a forum state, *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 503 (1939), and the application of a state statute to extra-territorial events where both the employer and employee maintain a close relationship with the forum state. *Alaska Packers Assoc. v. Industrial Acc. Comm'n*, 294 U.S. 532, 549-50 (1935). The Court has also upheld states' attempts to protect the interests of their residents by giving them new statutory rights in dealing with foreign corporations and transactions. *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954). *See also Clay v. Sun Ins. Office Ltd.*, 377 U.S. 179 (1964) (forum law applied where claimant resided in forum state before loss, and loss occurred in forum state). None of these situations is remotely similar to the instant action.

Missouri has no interest whatsoever in controlling what occurs in a Wisconsin employment relationship involving two Wisconsin residents in which all material events occur in Wisconsin. As the court below found, Missouri ceased to have any contact with the parties or their employment relationship five years before McCluney's termination, 649 F.2d at 583, when McCluney voluntarily accepted Schlitz's offer of a promotion and moved to North Carolina never expecting to return to his Missouri job. (Tr. 232). Even McCluney has stipulated his employment contact is governed by Wisconsin law (M. App. 22), and conceded his termination to be "purely a Wisconsin event." (S. App. 3). On these facts, it would be difficult to imagine a more flagrant extra-territorial extension of police power—or a more blatant violation of the Due Process Clause. The decision below is plainly

correct in applying the Due Process Clause to avoid this unconstitutional extra-territorial application of state law.

C. The decision below is in complete accord with Missouri choice-of-law principles and, thus, the decision should be affirmed on alternative grounds. The underlying premise of McCluney's appeal is that use of the Due Process Clause in this action prevented the selection and application of Missouri law to McCluney's claim. This is simply incorrect. Missouri choice-of-law principles would not have resulted in use of the Missouri service letter statute in this case irrespective of the Due Process Clause. Although the decision below did not need to reach this issue, 649 F.2d at 584 n. 5, controlling Missouri conflict of law principles indicate Wisconsin provides the applicable substantive law for this case.

This choice-of-law question is relatively straightforward. Jurisdiction for this action is invoked on the grounds of diversity of citizenship pursuant to 28 U.S.C. § 1332 (1970), (M. App. 28, ¶ II), and the doctrine of *Erie RR. Co. v. Tompkins*, 304 U.S. 64 (1938), thus applies. Under *Erie*, a federal court in a diversity case must apply the choice-of-law principles of the state in which it sits. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Missouri choice-of-law principles therefore control this case.

Missouri would apply the "grouping of contacts" choice-of-law principles of the Restatement (Second) of Conflict of Laws (1971) [hereinafter "Restatement (Second)"] to the issues in this lawsuit. This would occur whether this action is viewed as a common law breach-of-contract action, as a tort action, or as a statutory cause of action. *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969) (en banc). The *Dixon* case definitively adopted the "grouping of contacts" theory espoused by the Restatement (Sec-

ond). A recent Missouri case has affirmed the commitment of Missouri law to the Restatement "grouping of contacts" choice-of-law rationale in employment contract cases. *National Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 102 (Mo. Ct. App. 1979). *See also Havenfield Corp. v. H. & R. Block, Inc.*, 509 F.2d 1263 (8th Cir.), *cert. denied*, 421 U.S. 999 (1975); *Chmielski v. City Products Corp.*, 71 F.R.D. 118, 169 (W.D. Mo. 1976). The same result is reached regarding McCluney's claims based on a statutory cause of action, such as a service letter action. *Cf. State ex rel. Broglin v. Nangle*, 510 S.W.2d 699 (Mo. 1974) (en banc) (statutory wrongful death action). Thus, the conclusion is inescapable that the "grouping of contacts" approach should control all aspects of the case *sub judice*.

Applying Restatement (Second) principles to the facts, the conclusion is equally inescapable that the overwhelming weight of contacts in this action is in Wisconsin. McCluney has conceded as much by admitting that his employment contract is governed by the law of Wisconsin. (M. App. 22). McCluney's concession is confirmed by an independent analysis of the contacts in this case under Restatement (Second) conflicts principles.

The starting point must be the decision in *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699 (Mo. 1974) (en banc), which was a statutory wrongful death action. The deceased, his wife (the plaintiff), and the corporate defendant were all residents of Missouri, although Texas was the place of the accident and defendant's principal place of business. The plaintiff sought to pursue her claim under the Texas wrongful death statute which, unlike its Missouri counterpart, did not contain restrictions on who could bring the action or on what damages could be recovered. Despite the relatively even balance of contacts between the two states, the Missouri court had little difficulty in finding Texas law controlling. In analyzing

the contacts and state interests involved, the court quoted with approval from the lower court ruling:

> Texas has a definite interest in having the full extent of its laws control the activities within its borders of corporations which locate their principal place of business in that state.

Broglin, 510 S.W.2d at 703. The court reasoned that Texas "has a significant interest in regulating the conduct of railroad corporations which operate within its borders." 510 S.W.2d at 703. The interest of Texas in applying its damage law was particularly strong because of its interest "in exercising control over the in-state activities of corporations which locate in that state." 510 S.W.2d at 703. Thus, the place of the wrongful act and the principal place of business were given primary emphasis in analyzing the weight of contacts and determining the applicable law.

This task is far easier in the instant action than in *Broglin* because *all* significant contacts in this action are with Wisconsin. McCluney lived in Wisconsin, worked in Wisconsin, and terminated his employment in Wisconsin. Schlitz is incorporated in Wisconsin and has its corporate headquarters there. Under *Broglin,* Wisconsin has substantial interests in controlling the activities of Schlitz and other corporations which locate there, and in regulating the conduct of such corporations within the state. Missouri has no interest whatsoever in regulating the activities of Wisconsin corporations in Wisconsin, especially when these activities involve only Wisconsin residents. *See* Restatement (Second) §§ 151 (for "injurious falsehoods"); 196 (employment contract). Thus, under Missouri choice-of-law principles, it is clear that the law of Wisconsin controls this case. Wisconsin has legislated in the area and thus defined the interests and public policy of Wisconsin in the area of blacklisting and service letters. Wis. Stat. Ann. § 134.02 (West 1974). (S. App. 10).

Remedies are also provided by this legislation, however, Wisconsin has not recognized an implied cause of action under § 134.02 and has not authorized punitive damages to be recovered thereunder.

D. By its own terms and as interpreted, the Missouri service letter statute has no extra-territorial effect and is therefore inapplicable, even assuming Missouri substantive law applies. The extra-territoriality issue presented in the instant appeal is a fundamental one concerning a state's power to affect and control persons and events having no contact with that state. It is axiomatic that that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). *See Tattis v. Karthans*, 215 So. 2d 685 (Miss. 1968) (Mississippi "Actionable Word Statute" granting cause of action for actionable words could not be applied to words spoken in North Carolina). Recognizing this principle, Missouri courts have interpreted Mo. Rev. Stat. § 290.140 (1978) so as to avoid extra-territorial applications. Thus, even if Missouri substantive law was to be selected under the Missouri "grouping of contacts" rationale, the Missouri service letter statute would still be inapplicable to McCluney's Wisconsin termination because a Missouri court would not apply it extra-territorially.

The starting point for this analysis is the language of the statute itself, which by its own terms is inapplicable to McCluney. The critical language in this statute is the introductory phrase, "Whenever any employee of any corporation doing business in this state," because this language conditions the applicability of the statute. This language has been definitively construed by a Missouri appellate court, which held that

> [T]he language "whenever any employee of any corporation doing business in this state . . ." means an

> employee *working in Missouri for a corporation doing business in Missouri* and that meaning is what was intended by the Legislature.

Horstman v. General Elec. Co., 438 S.W.2d 18, 20 (Mo. Ct. App. 1969) (emphasis supplied). It is thus clear that the service letter statute is applicable only to Missouri employment relationships. *Accord*, *Cordon v. Trans World Airlines, Inc.*, 442 F. Supp. 1064 (D. Kan. 1977) ("[T]he court is convinced that the *Horstman* decision is a wise one and that the court there reached a logical decision." 442 F. Supp. at 1068). No such Missouri employment relationship is present in this case, and the service letter statute, as it has been interpreted by Missouri courts, therefore can have no extra-territorial effect on McCluney's Wisconsin termination.

The fact of McCluney's initial employment in Missouri in 1956 is insufficient for the statute to apply if one considers the anomalous results such a conclusion would produce. The *Horstman* court recognized that the service letter statute must not be given extra-territorial application, because:

> If appellant, performing no duties as an employee of respondent in Missouri, is entitled to a service letter under the Missouri service letter statute, then it would be logical that respondent's employees in all states of the Union and foreign countries where respondent happened to be doing business would also be entitled to a service letter under the Missouri service letter statute. In our opinion such a result was not intended by the Legislature.

Horstman, 438 S.W.2d at 20. The court in *Cordon* recognized and discussed this rationale with approval, noting that "[a] contrary decision would lead to absurd results." *Cordon*, 442 F. Supp. at 1068.

The same absurd results would flow from the application of the statute to McCluney because employers would be perpetually liable under the service letter statute for all employees who were initially hired in Missouri. The statute would apply irrespective of subsequent changes in the employee's place of employment, promotion, or in the employer's business. An employer, such as Schlitz in the instant case, could promote an employee hired in Missouri to a position across the country, subsequently cease doing business in Missouri, and then years later be exposed to liability for failure to observe the requirements of Mo. Rev. Stat. § 290.140 (1978). The *Horstman* court found that such a result was not intended by the legislature. *Horstman*, 438 S.W.2d at 20. Yet, this is precisely what McCluney seeks.

In an attempt to achieve this result, McCluney has urged another Missouri case before this Court, *Bliven v. Brunswick Corp.*, 575 S.W.2d 788 (Mo. Ct. App. 1978). The facts in *Bliven* resemble the instant action only in that both plaintiffs were originally employed in Missouri and subsequently continued their employment in other states where they were terminated. Beyond that, crucial distinctions exist between the two cases, and *Bliven* furnishes no support for McCluney's position.

First and foremost, *Bliven* was before the court on a motion to dismiss. The court, accepting the allegations of the petition to be true, merely held that the petition stated a cause of action sufficient to withstand a motion to dismiss. Bliven had alleged in his petition that his contract of employment was entered into in Clay County, Missouri, that he was a Missouri resident, that Brunswick did business in Missouri, and that he had served under his employment contract for a period of more than 90 days. Bliven was transferred to New Orleans nine months after he was hired, where he worked for five months. From

there he was transferred to Council Bluffs, Iowa, where he worked for two months, and from there he was transferred to Wichita, Kansas, where he worked for eight months. 575 S.W.2d at 790. Thus, within a two-year period, Bliven worked in four states between which he was transferred successively. 575 S.W.2d at 790. Bliven had worked only for short periods of time in states other than Missouri, the longest being eight months, and thus under the pleaded facts Bliven never developed a nexus with any state other than Missouri. The *Bliven* court concluded on these pleaded facts that "Bliven had significantly greater and, indeed, decisive, contacts and *nexus* with Missouri." 575 S.W.2d at 791.

Decisive contacts and the required *nexus* were found to be absent by the Eighth Circuit on the very different facts of the instant action. The "absurd results" eschewed by *Horstman*, coupled with the "contacts and *nexus*" test followed by *Bliven*, clearly indicate that Missouri courts would not extra-territorially apply the service letter statute to the facts of this case. Notably, the *Bliven* court did not overrule the *Horstman* decision, but instead recognized its contacts analysis and distinguished it on the facts. *Bliven*, 575 S.W.2d at 791-92. As demonstrated above, and as found by the Eighth Circuit, 649 F.2d at 583, McCluney had absolutely *no* "contacts and *nexus*" with Missouri after 1970, when he left Missouri never expecting to return. With such decisive distinctions in relative contacts and *nexus*, neither *Bliven* nor *Horstman* would apply the service letter statute to the instant facts.

E. Even if the service letter statute applies, the statute as applied in this case violates the First Amendment. While Schlitz contends the service letter statute does not apply to the instant action, Schlitz has also challenged the

statute on First Amendment grounds.[7] Schlitz's First Amendment challenge is a three-pronged attack derived from *Rimmer v. Colt Indus. Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *rev'd on other grounds*, 656 F.2d 323 (8th Cir. 1981). (M. App. 43). The landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), extended for the first time the umbrella of First Amendment protections to state libel law with the Court specifically stating that its decision would not be guided or confined to the "mere labels" given to particular forms of expression by state law. 376 U.S. at 269. *New York Times* indicates that a state-applied label "can claim no talismanic immunity from constitutional limitations," and that any repression or limitation on expression "must be measured by standards that satisfy the First Amendment." 376 U.S. at 269. Thus, irrespective of the label applied, a state's regulation of speech can be sustained only if the state can show that "the regulation is a precisely drawn means of serving a compelling state interest," as confirmed by more recent decisions. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). This is so even if only corporations' rights of free expression are affected instead of those of individuals, *Consolidated Edison*, 447 U.S. at 535; *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), and even if only the detailing of private expression in the employer-

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7. Schlitz raised its First Amendment challenge for the first time on appeal below, which was the earliest opportunity to do so under the circumstances. The matter of what questions may be taken up for the first time on appeal is left primarily to the discretion of the appellate courts, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), and the Court has indicated that this discretion should be exercised in First Amendment cases, *e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Schlitz is squarely within the *Curtis* exception, having raised its First Amendment challenge as soon as it became aware of briefing of the issue in the *Rimmer* trial court. The *Rimmer* decision is the first to recognize First Amendment defenses in a service letter action just as *New York Times* was the first to apply them in a defamation case, as recognized in *Curtis*. Because of the importance of these First Amendment defenses, Schlitz urges the Court to consider them.

employee relationship is being affected. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

The Missouri service letter statute is an example of state action which substantially affects corporations' rights of free expression and therefore must be examined under First Amendment principles. *Rimmer v. Colt Indus. Operating Corp.*, 656 F.2d 323, 331 (8th Cir. 1981) (Bright, J., concurring). (M. App. 56). Most important among these is the requirement that the state regulation be drawn precisely so as to directly advance the state's underlying interest without being more extensive than necessary to advance that interest. *Consolidated Edison*, 447 U.S. at 540-41; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980). The injury derived from an incorrect statement in a service letter is functionally identical to that caused by ordinary defamation. Missouri's interest in awarding compensation to individuals injured by reason of incorrect service letters is thus no greater than its interests in compensating victims of other forms of defamation or injurious falsehoods. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court identified these state interests and struck a balance between those interests and First Amendment interests. In resolving this delicate balance, the Court set forth three First Amendment principles to govern state action in the private defamation area. Schlitz submits that Missouri's service letter statute is unconstitutional as applied because it fails to satisfy any of these three principles.

The first principle set forth in *Gertz* is that state laws may not impose strict liability for false speech. *Gertz* allows the states to retain substantial latitude in enforcing legal remedies for defamation, although the Court did not give the states free reign, specifically holding that:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate

> standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Gertz, 418 U.S. at 347 (footnote omitted). *Gertz* therefore teaches that a state may not impose strict liability for false speech injurious to private individuals. A plaintiff must establish some level of culpability in the making of a false statement before liability can be imposed.

The Missouri service letter statute is in flagrant violation of this First Amendment principle. The language of the statute establishes no standard of culpability, and the Missouri decisions make it clear that liability attaches if a plaintiff proves only that an incorrect service letter was issued. *No* fault need be established in connection with the incorrect statement, *i.e.*, that the letter was issued negligently or recklessly. *See Eimer v. Texaco, Inc.*, 518 F.2d 807 (8th Cir. 1975); *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 206 (Mo. 1972). The instruction given by the district court in the instant action followed this principle, and is typical of instructions based upon Missouri law. *See, e.g.*, Missouri Approved Instruction No. 23.08 (West 1981). The statute does not require a finding of negligence, gross negligence, or any other form of culpability in connection with the failure to state the true cause of termination. This is liability without fault in the purest sense, functionally identical to that proscribed by *Gertz*. 418 U.S. at 347.[8]

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8. This aspect of the service letter statute is even more constitutionally reprehensible than the traditional libel case because the "defamer" in a service letter action is *required* to speak. Courts have recognized that "the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence . . . ." *Russo v. Central School District No. 1*, 469 F.2d 623, 634 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (citations omitted). The service letter statute is particularly offensive to First Amendment principles because it *requires* an employer to speak and then imposes strict liability for a false speech regardless of the em-

(Continued on following page)

The second principle enunciated by *Gertz* is that state law may not presume damages from the existence of a defamatory statement. The Missouri service letter statute collides with this fundamental First Amendment principle with its judicially-created doctrine of presumed actual damages. Missouri decisions have long held that "[t]he law *presumes actual damage* to plaintiff from the failure of defendant to issue a proper service letter as required by the statute." *Heuer v. John R. Thompson Co.*, 251 S.W. 2d 980, 985 (Mo. Ct. App. 1952) (emphasis supplied). These "presumed actual damages" are awarded under Missouri law "without proof of any damages whatever," *id.*, and thus fly in the face of the *Gertz* holding which restricts damage awards to damages supported by *"competent evidence"* and for *"actual injury."* *Gertz*, 418 U.S. at 350 (emphasis supplied).[9]

Footnote continued—

ployer's good faith or innocent belief in the truth of his statements. *See Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 206 (Mo. 1972). This aspect of the service letter statute runs counter to the *Gertz* dissent which opposed the Court's culpability requirement. Mr. Justice White believed the defamer to be the only culpable party in a libel action because "[i]t is he who circulated a falsehood that *he was not required to publish.*" 418 U.S. at 392 (emphasis supplied).

9. The effect of this "presumed actual damage" doctrine is especially pernicious in cases such as the one *sub judice*. It is a fundamental principle of Missouri law that punitive damages may not be recovered unless a plaintiff also obtains an award of actual or compensatory damages, *Porterfield v. Burger King Corp.*, 540 F.2d 398, 403 (8th Cir. 1976); *Compton v. William Bros. Pipeline Co.*, 499 S.W.2d 795, 797 (Mo. 1973), yet a review of the reported decisions indicates that an incorrect service letter rarely causes actual damage due to loss of employment. The service letter plaintiff therefore uses the doctrine of presumed actual damages to get the proverbial foot in the courthouse door to obtain punitive damages, which normally comprise the most significant part of a service letter recovery. *See Rimmer* (Bright, J., concurring). 655 F.2d at 331. This is the theory pursued by McCluney, who even stipulated that the letter was never shown to prospective employers and that he was never refused employment by virtue of the service letter. (M. App. 34, § 53; 37,

(Continued on following page)

The availability of punitive damages for a service letter violation also runs afoul of the third First Amendment standard enunciated in *Gertz*. Again, in terms particularly applicable to service letter actions, the Court recognized that the legitimate state interest in providing compensation for defamation was not served by allowing punitive damage awards which are "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." 418 U.S. at 350. The Court concluded that recovery of punitive damages could not occur unless a plaintiff made a showing of "actual malice" under the *New York Times* standard, which would require the plaintiff to show that a statement had been made "with knowledge that it was false or with reckless disregard as to whether it was false or not." *New York Times*, 376 U.S. at 279-80. *Gertz* holds it would be unconstitutional for a state to allow recovery of punitive damages on a lesser showing.

This is precisely what the Missouri service letter statute authorizes, and what occurred in the instant action. Far from requiring a showing of actual malice, Missouri courts have traditionally interpreted the service letter statute as allowing a recovery of punitive damages on the far weaker showing of "legal malice." "Legal malice" has been defined as "the doing of a wrongful act intentionally without just cause or excuse." (Tr. 487); Missouri Approved Instruction No. 16.01 (West Supp. 1981). In the context of a service letter action, this standard has

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Footnote continued—

¶ 2). In this fashion the presumed actual damage award (generally anominal sum of $1.00) furnishes the vehicle for the service letter plaintiff to obtain punitive damages, in this case $400,000. Although the amount of presumed actual damages may be considered insubstantial in the abstract, the recovery of *any* actual damages without supporting competent evidence affronts the First Amendment as applied by *Gertz*, especially when such presumed damages provide the prerequisite to the punitive damages the Court is so reluctant to allow. *Gertz*, 418 U.S. at 350.

been diluted to the point where, as McCluney has aptly pointed out, "a violation of the 'service letter statute' is sufficient to submit the issue of punitive damages to the jury." (Plaintiff's Trial Memorandum filed January 9, 1980 at 4). This is because the "wrongful act," determined on a strict liability basis, is the assignment of an incorrect reason for termination in the service letter, which service letter the employer later "intentionally" mails to the plaintiff. Nowhere is it required that the jury find the corporation assigned a reason for termination "with knowledge that it [is] false or with reckless disregard of whether it [is] false or not." *New York Times*, 376 U.S. at 279-80.[10]

On the instant facts, a state statute which (1) imposes liability without fault, (2) presumes actual damage, and (3) awards sizable punitive damages, all with less than a *New York Times* showing of actual malice, violates fundamental First Amendment principles and is therefore unconstitutional as applied in this case.

CONCLUSION

McCluney's appeal to this Court presents nothing more than an opportunity for this Court to review the lower court's determinations on issues of state contract law. McCluney's theory is counter to his prior stipulations and concessions, and counter to the Eighth Circuit's careful findings based on the record in this case. Apart from

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10. In fact, the service letter statute has even been construed to allow the submission of punitive damages on a showing of "culpable indifference and negligence which amounted to positive misconduct." *Stephens v. Lever Bros. Co.*, 155 S.W.2d 540, 543 (Mo. Ct. App. 1941). Intentional service letter violations have also been found where defendants were completely unaware of the statute, with the Court "presuming" the defendant knew the law, and then finding that his actions contrary to this "knowledge" thereby became intentional. *Bubke v. Allied Building Credits, Inc.*, 380 S.W.2d 516, 522 (Mo. Ct. App. 1964).

McCluney's state law arguments, it is clear that the Eighth Circuit's judgment rests upon a proper application of the Due Process Clause and other independent grounds. No substantial question is presented for this Court's review. The appeal should be dismissed because of the state law questions or summarily affirmed.

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APPENDIX

Excerpt: Page 5 of Schlitz's "Reply to Plaintiff's Suggestions in Opposition to Defendant's Post-Trial Motions," filed in the District Court on March 3, 1980

Schlitz's customary method of communicating and implementing its personnel policies was through the policy procedure it had developed for that purpose, as set forth at length in the record and pretrial order. (Tr. 50-51, 54-57; P.T.O. ¶ III. 32.-33.) It is uncontroverted that the Creviston memo did *not* go through this procedure. Accordingly, there was absolutely no evidence to justify submission of this issue.

II.

COUNT II: THE SERVICE LETTER ISSUES

The second portion of plaintiff's brief completely fails to come to grips with the issues and authorities Schlitz has cited squarely supporting its contention that no valid service letter claim exists in this case. Rather than engaging the issues, plaintiff has attempted to taint Schlitz's analysis with the completely unjustified argument that it is a "tardy claim" and "newly discovered." (S.23,29)[11] Plaintiff totally ignores the group of cases Schlitz cited which deal directly with the extraterritorial application of statutes. *See* Schlitz's Suggestions at 20-23. Finally, plaintiff's brief fails to answer the fundamental questions of *power* posed by Schlitz, the *power* of the State of Missouri to affect persons *beyond* its boundaries. Plaintiff never offers an

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11. Plaintiff is evidently the only individual for whom Schlitz's argument is "newly discovered", because the extraterritoriality issue has been in this case since its inception. *See* Suggestions in Support of Schlitz's Motion for Summary Judgment filed December 21, 1977; Pretrial Order No. 2 ¶ VIII. 1. and 5.

analysis of how a Missouri statute can control a Wisconsin employee working in Wisconsin for a Wisconsin employer. A state's police power cannot extend into another state's sovereign territory any more than its taxing power can, for such an action would be an unconstitutional denial of due process of law.[12] Plaintiff does not contend otherwise in his Suggestions.

Plaintiff's only response to this flaw in his case is an argument based on statutory interpretation. Plaintiff argues that *Bliven* has "made it clear that, for purposes of defining 'hired in Missouri and working in Missouri,' the appropriate [time] frame is the time of hire and employment, not the time of firing or trial." (S.30) Plaintiff's

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12. The Supreme Court has held that it is a violation of the Due Process Clause of the Constitution for a state to attempt to project its taxing power beyond its border and tax property located in other states. *See Norfolk and Western Ry. Co. v. Missouri State Tax Commission*, 390 U.S. 317 (1968), and cases cited therein.

Excerpt: Page 26 of McCluney's Brief before the Eight Circuit, filed on or about August 22, 1980

applied" compel the choice of Missouri's law, since the place of making of the contract and/or where the major portion of the services to be rendered are easily evident in every case and, thus, lead to like results in like cases. Thus, choice-of-law considerations mandate the choice of Missouri substantive law.

E. Application of the Missouri Service Letter Statute Does Not Offend Due Process.

Finally, Schlitz argues that the extraterritorial application of the Missouri service letter statute to the instant case violates due process. This contention is wholly without merit. Initially, it may be noted, as was discussed, *supra*, that there has been attempted no extraterritorial application of this statute. The terms of the statute were incorporated into the employment contract by operation of law. *Cheek v. Prudential Life Ins. Co.*, 192 S.W. 387 (Mo. 1916), *affirmed*, 259 U.S. 530, (1940). Thus, the issue at bar is only the construction of that employment contract.

Schlitz again chooses to confuse the issue by arguing the case to be "a purely Wisconsin event involving only Wisconsin residents". (Appellant's Brief at 37). We have already seen that, despite Schlitz' mistaken contentions to the contrary, what we have here is a Missouri employment contract, the terms of which called for the issuance of a true service letter to McCluney upon his termination. The termination itself may be conceded to be a purely Wisconsin event. *That is not the issue here.*

Beyond that, Schlitz' due process argument merits little consideration. It has been held that, "[i]*n the area of conflict of laws the Due Process Clause prevents an*

arbitrary application of a state's jurisprudence to an out-of-state event." Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 563 (2nd Cir. 1962). It has further been stated that the Due Process Clause prescribes limitations on states' choice of law decisions similar to the "fair play and substantial justice" limits on judicial jurisdiction. *Traveler's Health Ass'n v. Commonwealth of Virginia*, 339 U.S. 643, 648 (1950); *Aldens, Inc. v. Packel*, 524 F.2d

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1383
Civil

FORREST McCLUNEY,
Appellee,

vs.

JOS. SCHLITZ BREWING COMPANY,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

Motion of Appellee to Strike Issues Not Raised Below

Appellee moves this Court to strike the following issues stated in Appellant's Brief:

A. "Assuming *arguendo* that Missouri substantive law controls and the service letter statute applies extra-territorially, such an application of the statute constitutes an unconstitutional denial of due process of law.

B. The district court erred by applying Mo. Rev. Stat. § 290.140 (1978), which statute is unconstitutional as applied because it violates the First Amendment of the United States Constitution. . . .

This motion is premised upon the fact that appellant's constitutional challenges to the Missouri Service Letter Statute Section 290.140 RSMo 1978 are not properly before this Court. Appellant's contentions that application of the

Missouri Service Letter Statute is an unconstitutional denial of due process of law and that it violates the First Amendment were not raised in the trial court. Instead, such issues have been raised for the first time on appeal.

The specific grounds for this motion are contained within the Suggestions in Support, which are attached hereto and incorporated by reference herein.

WHEREFORE, appellee moves this Court to strike issues A.4. (due process) and B. (First Amendment) because these issues cannot be raised for the first time on appeal.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was hand delivered, on this 14th day of July, 1980, to:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1383
September Term, 1979

FORREST McCLUNEY,
Appellee,

v.

JOS. SCHLITZ BREWING CO.,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

---

Appellee's motion to strike portions of the appellant's brief has been considered by the Court and is denied without prejudice to the right of appellee to argue, before the panel to which this case is assigned, that the two constitutional issues listed in appellee's motion are not properly before this Court.

July 31, 1980.

N.C. Gen. Stat. § 14-355 (1969)

Blacklisting employees. - If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such dicharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge.

N.C. Gen. Stat § 14-356 (1969)

Conspiring to blacklist employees. - It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

Wis. Stat. Ann. § 134.02 (West 1974)

Blacklisting and coercion of employes.

(1) Any 2 or more persons, whether members of a partnership or company or stockholders in a corporation, who are employers of labor, who shall combine or agree to combine for the purpose of preventing any person seeking employment from obtaining the same, or for the purpose of procuring or causing the discharge of any employe by threats, promises, circulating blacklists or causing the same to be circulated, or who shall, after having discharged any employe, prevent or attempt to prevent such employe from obtaining employment with any other person, partnership, company or corporation by the means aforesaid, or shall authorize, permit or allow any of his or their agents to blacklist any discharged employe or any employe who has voluntarily left the service of his employer, or circulate a blacklist of such employe to prevent his obtaining employment under any other employer, or who shall coerce or compel any person to enter into an agreement not to unite with or become a member of any labor organization as a condition of his securing employment or continuing therein, shall be punished by fine of not more than $500 nor less than $100, which fine shall be paid into the state treasury for the benefit of the school fund.

(2) Nothing in this section shall prohibit any employer of labor from giving any other such employer, to whom a discharged employe has applied for employment, or to any bondsman or surety, a truthful statement of the reasons for such discharge, when requested so to do by such employe, the person to whom he has applied for employment, or any bondsman or surety; but it shall be a violation of this section to give such information with the intent to blacklist, hinder or prevent such em-

ploye from obtaining employment; neither shall anything herein contained prohibit any employer of labor from keeping for his own information and protection a record showing the habits, character and competency of his employes and the cause of the discharge or voluntary quitting of any of them.

Excerpt: Page 6 of McCluney's "Pretrial Brief of Plaintiff," filed in the District Court on or about November 13, 1979

385 F. Supp. 1291, 1297 (W.D. Mo. 1974), this Court was faced with the conflicts of law question in a contract case, and there announced it would follow the grouping of contracts approach outlined in the Restatement Second. Thus, there appears ample authority supporting the abandonment of the *lex loci contractus* rule, and focusing instead on the grouping of contacts in the particular fact setting.

Since the *Nelson* and *Moss* decisions, the Missouri Court of Appeals has decided *Bliven v. Brunswick*, 575 S.W.2d 788 (Mo. App. K.C.D. 1978). There under the doctrine of *lex loci contractus*, the court held that the Missouri Service Letter Statute was incorporated into plaintiff's employment contract because plaintiff was hired in Missouri.

As a result of *Bliven*, it is not clear whether Missouri would follow the *lex loci contractus* doctrine or a grouping of the contacts approach. However, as to the question of severance pay, it would seem that Wisconsin law applies because the offer of severance pay was communicated from defendant's corporate headquarters in Wisconsin and plaintiff was employed in Wisconsin when the termination procedure was made and he continued in this employment thereafter "accepting" the termination procedure. See, *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), where Wisconsin law was applied under a grouping of the contacts approach because the employee benefit was communicated from and administered by the home office in Wisconsin.

Apparently, Missouri and Wisconsin law is the same with respect to the contractual right to receive employee

benefits; therefore, the question of which law to apply is less critical. Nevertheless, plaintiff believes Count I of his petition to be governed by the law of Wisconsin, whether a *lex loci contractus* doctrine or a grouping of the contacts is applied here.

Defendant throughout the action, has tried to lessen the legal effect of the plaintiff's contractual right to receive severance pay by classifying the Creviston correspondence of July 11, 1975 (Exhibit A) as a procedure and not a policy. Even if this offer to pay severance pay was not part of the official management policy of Schlitz, it is the contention of the plaintiff that it was an offer communicated to him which he "accepted" by his continued employment with Schlitz after receiving the offer of severance pay. *Schlosser v. Allis Chalmers Corp.*,

Appellant's Reply Brief

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No. 81-589

In the Supreme Court of the United States

October Term, 1981

FORREST McCLUNEY,
Appellant,

vs.

JOS. SCHLITZ BREWING CO.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLANT FORREST McCLUNEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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ISSUE PRESENTED

Did the Court of Appeals err in holding that application of the Missouri service letter statute in this case violated the due process clause of the Fourteenth Amendment to the United States Constitution because of the lack of significant contacts between the State of Missouri, the parties and their employment relationship when Appellant was first hired in Missouri, worked there for fourteen years before being transferred to North Carolina for five years and then to Wisconsin for a few months before being fired.

TABLE OF CONTENTS

ISSUE PRESENTED I
TABLE OF AUTHORITIES III
ARGUMENT IN OPPOSITION TO APPELLANT'S MOTION TO DISMISS OR AFFIRM 1
CONCLUSION 9
PROOF OF SERVICE 10
APPENDIX:
Schumacher v. Mirro Aluminum Corp., No. 76-CV-845-W-1 (W.D. Mo. Aug. 13, 1977) A1

TABLE OF AUTHORITIES

CASES

Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532 (1935) 4, 5
Allstate Ins. Co. v. Hague, 101 S.Ct. 633 (1981) 2, 4, 5, 8
Bliven v. Brunswick Corp., 575 S.W.2d 788 (Mo. App. 1978) 6, 7
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 9
Horstman v. General Electric Co., 438 S.W.2d 18 (Mo. App. 1969) 6, 7
McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578 (8th Cir. 1981) 1, 2, 3
Patter v. St. Louis-San Francisco Ry., 622 F.2d 979 (8th Cir. 1980) 8
Rimmer v. Colt Industries Operating Corp., 656 F.2d 323 (8th Cir. 1981) 5, 9
Schumacher v. Mirro Aluminum Co., No. 76-CV-845-W-1 (W.D. Mo. Aug. 13, 1977) 7

STATUTE

Section 290.140 RSMo (1978) 1

BRIEF OF APPELLANT FORREST McCLUNEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ARGUMENT IN OPPOSITION TO APPELLANT'S MOTION TO DISMISS OR AFFIRM

Forrest McCluney was hired by Jos. Schlitz Brewing Co. in Missouri, and he worked there for nearly fourteen years. He was then transferred out of Missouri and only five years later Schlitz fired him. The jury found that Schlitz willfully and maliciously stated that McCluney had resigned his employment and thus deprived him of $32,500.00 in severance pay due him because he was fired which would not have been due had he resigned. The jury also awarded McCluney actual and punitive damages under the Missouri service letter statute, §290.140 RSMo (1978) (reprinted at p. 3 of Appellant's Jurisdictional Statement), which grants employees a private cause of action against employers who willfully and wantonly make false statements in service letters requested by terminated employees.

The majority opinion of the Eighth Circuit held that the Missouri service letter statute was unconstitutionally applied in this case because the Court found no significant contacts between the State of Missouri, the parties and the transaction which satisfy constitutional due process. *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir. 1981).

Schlitz has moved this Court to dismiss McCluney's appeal on the basis that it presents nothing more than a question of state law. It is clear, however, that the majority opinion of the Eighth Circuit was founded on a constitutional, not a state law question.

The Eighth Circuit Erred in Holding That the Application of the Missouri Service Letter Statute in This Case Violates the Due Process Clause Where the Plaintiff Was First Hired in Missouri, Worked There for Fourteen Years Before Being Fired in Wisconsin After Being Transferred There.

This Court in *Allstate Insurance Co. v. Hague,* 101 S.Ct. 633 (1981), set out the minimum due process requirements for applying the law of a state in a particular case; a choice of law is invalid where the State whose law is applied has no significant contact or contacts, creating state interests, with the parties and the transaction. *Id.* at 638, 650. When the majority opinion of the Eighth Circuit applied this analysis in *McCluney,* however, it erroneously narrowed the definition of the relevant transaction so as to totally eliminate any contacts Missouri had with the parties or the transaction. The majority opinion held, without support of precedent or reason, the employment relationship between McCluney and Schlitz was actually divided into three separate contracts; one in Missouri, one in North Carolina and one in Wisconsin. Because the Missouri service letter statute is triggered by an employee's termination, the majority held that the only relevant transaction was the "Wisconsin contract" with which Missouri had no contacts. By so defining the transaction, the majority preordained its result that there were insufficient contacts between Missouri, the parties and their employment relationship to satisfy due process.

Despite Appellee's argument in its motion to dismiss or affirm, the definition of the appropriate transaction is a question of federal constitutional law, not of state substantive law. The tripartite contacts analysis, including the determination of the appropriate transaction, is a development of constitutional law. As such, the question of whether the majority opinion appropriately defined the

relevant transaction in this case is a substantial federal question warranting plenary review by this Court.

The analysis of the majority opinion in *McCluney* focused entirely on the question of how many employment contracts between McCluney and Schlitz existed. The court reached a totally unsupported and unreasoned conclusion that the parties' employment relationship was evidenced by three separate contracts. To do so, the majority took the strained position that McCluney was discharged and rehired each time he was promoted. As Judge Arnold said in his concurring and dissenting opinion, this position is "rather artifical, the kind of thing lawyers and scholars think up after the fact, rather than a consideration actually present in the minds of the parties when McCluney decided to accept Schlitz' offers of promotion." 649 F.2d at 585.[1] This erroneous conclusion focused the court's attention on only the contacts McCluney's employment relationship had with Wisconsin and, therefore, made it impossible to reach any conclusion different than the one it reached.

This narrow view of the elements of the due process analysis is erroneous. First, the plurality opinion in *Hague* considered the deceased's place of employment a relevant contact with the State of Minnesota even though that case

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1. Certainly, it was the opinion of Schlitz' director of personnel that Schlitz and McCluney had one, continuous employment contract:

"Q. Right. Now, let's take, use the word termination or resignation, I don't care what you use. He [McCluney] was continually an employee of the company through these various transfers from the day he went to work in Kansas City, Missouri, until he left up here, no matter when he left; isn't that right?

"A. That's correct.

"Q. And that is what your records reflect, is it not?

"A. That's correct."

Deposition of Robert L. Creviston, Director of Personnel at 35.

did not involve a question related to the deceased's employment. Instead, the issue involved was the interpretation of the uninsured motorist clause of the deceased's automobile insurance policy in relation to the accident which caused the deceased's death. Speaking of this issue, the plurality said, "That Mr. Hague was not killed while commuting to work or while in Missouri does not dictate a different result. To hold that the Minnesota Supreme Court's choice of Minnesota law violated the Constitution for that reason would require too narrow a view of Minnesota's relationship with the parties and the occurrence giving rise to the litigation." 101 S.Ct. at 641. *Cf. Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935). It is clear this Court takes a wide view of the contacts which must be evaluated in a due process analysis.

Second, the majority opinion put the cart before the horse when it determined that only the contacts related to the "Wisconsin contract" were relevant. Its analysis is inverted because the exact purpose of analyzing the contacts between the State, the parties and the transaction is to determine what contacts are relevant. By determining what contacts are relevant before applying the *Hague* analysis, the majority opinion circumvented the purpose and importance of that analysis. By plugging into the analysis only those contacts which the majority had already deemed relevant, the majority made application of this Court's analysis expressed in *Hague* a worthless expenditure of time and thought.

Finally, this Court held in *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935), that it was constitutionally permissible to apply California law to an employment contract executed in California where the contract required the employee to work in Alaska. The *Hague* Court said that in *Alaska Packers* "the most

significant contact of the worker with California was his execution of an employment contract in California." 101 S.Ct. at 639. In this case, McCluney executed his employment contract in Missouri. Arguably, this fact alone is a sufficient contact with Missouri to apply Missouri law. However, Missouri has even more substantial contacts with the McCluney/Schlitz employment relationship; McCluney, unlike the plaintiff in *Alaska Packers,* lived and worked in Missouri and did so for fourteen years.

Like California in *Alaska Packers,* Missouri has a substantial interest in applying its law to employment contracts executed and performed in Missouri. Interesting enough, Judge Heaney, the author of the majority opinion in this case, authored another opinion that set out the interests of the State of Missouri that are protected by its service letter statute. *Rimmer v. Colt Industries Operating Corp.,* 656 F.2d 323 (8th Cir. 1981) (also reprinted in appendix to Appellant's Jurisdictional Statement). Judge Heaney said the statute attempts to assure that a Missouri worker's "ability to sell his skills to a potential employer would not be hampered by a previous employer's refusal to truthfully describe his work history" and to assure Missouri employers can " 'ascertain the degree of . . . intelligence . . . honesty, capacity and efficiency' of job applicants." *Id.* at 328. Missouri's interests do not wane when a nationwide employer transfers a longtime Missouri resident and employee to another state because of the likelihood that should that employee be terminated after leaving Missouri he or she would return to Missouri to seek other employment, the state where he or she has significant and longtime ties. Forrest McCluney is a prime example of this type of an employee.

Although the sufficiency of the contacts is a constitutional question, it is helpful to consider two cases the Missouri courts have decided concerning the Missouri

service letter statute; *Bliven v. Brunswick Corp.*, 575 S.W. 2d 788 (Mo. App. 1978); *Horstman v. General Electric Co.*, 438 S.W.2d 18 (Mo. App. 1969). These cases set statutory limits on the extraterritorial application of the Missouri service letter statute.

The Missouri Court of Appeals in *Horstman* established that certain minimum contacts with Missouri must exist before the Missouri service letter statute can be applied in a given case. The court held that those minimum contacts were not met where the plaintiff, a Missouri resident, was hired in Kansas by a New York corporation authorized to do business both in Kansas and Missouri, worked in Kansas and was fired there.

The Missouri Court of Appeals was greatly concerned with the extraterritorial application of the statute, but on a statutory not constitutional basis; "Certainly the Legislature did not intend the service letter statute to have extraterritorial application, such as [Employee] seeks in this case. . . . 'The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect.'" 438 S.W.2d at 20. In analyzing whether application of the statute would have extraterritorial effects, the *Horstman* court reviewed the contacts the plaintiff and his employment had with the State of Missouri. The court concluded "[t]here were no contacts between [Employee] and the State of Missouri insofar as his employment or discharge by [Employer] was concerned." *Id.* at 21. This analysis is remarkably similar to the *Hague* tripartite contacts analysis for determining due process limitations on application of state law. Of course, the *Horstman* case is not controlling in this situation, however, it represents a reasoned determination of a contacts analysis very similar to the one applicable in this case.

In *Bliven*, the Missouri Court of Appeals held that the service letter statute applied to an employment contract executed in Missouri, where the employee worked in Missouri for nine months before being transferred to various other states for a total period of fifteen months, the last state being Kansas where the employee was fired. The employer argued that because the employee was transferred to states other than Missouri and was fired outside of Missouri, applying the service letter statute would be an impermissible extraterritorial application of the statute. Again, the Missouri Court of Appeals was concerned with the contacts between the plaintiff's employment and the State of Missouri. The court, however distinguished *Horstman* on the grounds that "Bliven had significantly greater and, indeed, decisive, contacts and *nexus* with Missouri." 575 S.W.2d at 791. Again, although *Bliven*, of course, does not control the constitutional questions involved in this case, it indicates that the Missouri courts would find that McCluney had "decisive" contacts with Missouri. *Cf. Schumacher v. Mirro Aluminum Co.*, No. 76-CV-845-W-1 (W.D. Mo. Aug. 13, 1977) (federal district court, following the contacts analysis expressed in *Horstman*, held that an employment contract entered into in Wisconsin, where employee was trained in Wisconsin, was transferred to Kansas, had Kansas and Missouri as a territory and was told of his termination in Missouri, was a Wisconsin, not a Missouri, contract and, therefore, the Missouri service letter did not apply). (Reprinted in Appendix).

Appellee in its Motion to Dismiss or Affirm attempts to make Appellant's concession, in his brief to the Eighth Circuit that McCluney's termination was "purely a Wisconsin event," a controlling consideration. Appellee's tremendous reliance on this one event is, however, unfounded. This concession was made with respect to the proper choice-of-law issue because *Bliven* makes it unquestionably clear

that the place of termination is not controlling. But for the constitutional question before this Court, this concession makes even more clear the breadth of the proper due process analysis. No one event is controlling. Instead, *Hague* clearly recognizes that all contacts between a state, the parties and the transaction must be considered to determine if it would be fundamentally unfair to apply a given state's law. The existence of sufficient contacts with one state to apply its law, does not exclude the possibility that another state's law may also be constitutionally applied. If this were not the case, then there would be no need to have state choice-of-law rules because the question of what state's law applies would be entirely a federal constitutional issue. This is clearly not the case.

Contrary to Appellee's argument, it is equally irrelevant for due process purposes that Appellant stipulated that Wisconsin law controlled the severance pay issue. The stipulation involved an admission that Wisconsin had the *most* significant contacts with the severance pay issue under a choice-of-law analysis. The severance pay practice was promulgated by Schlitz while McCluney was working in Wisconsin. The fact that Wisconsin law controls one aspect of McCluney's employment contract during its last two months is not controlling or even relevant to the constitutional question presented in this case. Schlitz misleads this Court when it states that McCluney stipulated that the "employment contract" was to be considered under Wisconsin law. McCluney stipulated only that Wisconsin law controlled the severance pay issue. Certainly under due process, as well as, choice-of-law analysis, different state's laws may control different aspects of an employment relationship that lasted over nineteen years. *See, Potter v. St. Louis-San Francisco Ry.*, 622 F.2d 979 (8th Cir. 1980) (different issues arising under the same cause of action may each be decided under laws of different states). The

issues in the severance pay claim are different than those in the service letter claim, therefore, the contacts which are relevant under the due process analysis are also different for each claim.

Finally, Schlitz argues that the decision of the Eighth Circuit should be affirmed on the alternate grounds that (1) the decision below comports with Missouri choice-of-law principles; (2) by its own terms the Missouri service letter statute does not have extraterritorial effects and (3) the service letter statute conflicts with the first amendment to the United States Constitution. These issues, not having been decided by the court of appeals below, are not now properly before this Court, and, therefore, these arguments should not be considered. Moreover, the first and second alternate grounds for affirming the court of appeals are clearly issues of state law that the district court decided contrary to Schlitz' argument and that do not raise important issues of federal statutory or constitutional law. As to the first amendment issue, contrary to Appellee's misleading indication in its brief, the Eighth Circuit in *Rimmer v. Colt Industries Operating Corp., supra, reversed* the trial court on the exact basis on which Appellee relies. In *Rimmer,* the Eighth Circuit held that where the plaintiff alleges that the statements in the service letter were false, the employer knew they were false but nonetheless wantonly and maliciously issued the letter, then *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) poses no problem as to the constitutionality of the statute.

CONCLUSION

The concern in this lawsuit is the application of the Missouri service letter statute to the employment relationship between McCluney and Schlitz. Clearly, their employment relationship was much more than the "Wisconsin contract" which the majority arbitrarily focused

on as the only relevant transaction. Their employment relationship included McCluney's hiring in Missouri, and it continued through his fourteen year term of service in Missouri. Appellee's argument that these very significant contacts with Missouri should be ignored, is an attempt to put blinders on the Court so as to obscure from its vision the contacts which are sufficient to constitutionally justify application of the Missouri service letter statute in this case. The limitations imposed by the due process clause upon a state's choice-of-law determination should not be used to overcome a judgment which it would not have rendered.

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PROOF OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Jurisdictional Statement were deposited in the United States postal service, first class postage prepaid, to Paul Scott Kelly, Gage & Tucker, 2345 Grand Avenue, P. O. Box 23428, Kansas City, Missouri 64141, attorneys for Jos. Schlitz Brewing Co. this 2nd day of November, 1981.

J. MICHAEL VAUGHAN

APPENDIX

(Filed August 13, 1977)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 76 CV 845-W-1

ALFRED F. SCHUMACHER,
Plaintiff,

v.

MIRRO ALUMINUM COMPANY,
Defendant.

MEMORANDUM AND ORDER

This case presently pends on defendant's motion to dismiss, or in the alternative, for summary judgment. Plaintiff's action arises under the Missouri service letter statute, Mo. Rev. Stat. §290.140 (1969). Defendant's contention is that the Missouri service letter statute does not impose obligations on an employer whose contract with the employee is an out of state contract. Since defendant believes the employment contract in question in this case is a Wisconsin contract, it concludes that it is under no obligation to provide plaintiff with a service letter. Plaintiff contends that since his notification of dismissal occurred in Missouri and his sales territory included portions of Missouri, his employer was obligated to provide him with a service letter under §290.140. For the reasons we shall state, defendant's motion will be treated as a motion for summary judgment and will be granted.

Under Rule 12(b)(6), F.R.Civ.P., a court must treat any motion to dismiss for failure to state a claim as a motion for summary judgment if it accepts any "matters outside the pleading" in support of or opposition to a motion to dismiss. Since we believe proper disposition of this motion requires us to consider the affidavit submitted by defendant in support of its motion, we must treat this motion as a motion for summary judgment under Rule 56, F.R.Civ.P. *See, 2a Moore's Federal Practice* ¶12.09[3], at 2302.

When a party moves for summary judgment pursuant to Rule 56, F.R.Civ.P., disposition of the motion requires the application of strict standards. The United States Supreme Court has stated:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.Civ.P. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial. . . The purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962).

Summary judgment is appropriate only when "the movant has established his right to a judgment with such clarity as to leave no room for controversy and the other party is not entitled to recover under any discernible circumstances." *Ozark Milling Co. v. Allied Mills, Inc.*, 480

F. 2d 1014, 1015 (8th Cir. 1973). All permissible inferences which may be drawn from the facts presented "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The files and records in this case reflect that there is "no room for controversy" over the material factual circumstances. The question to be resolved is solely a legal question as to whether the Missouri service letter statute applies to the plaintiff's past employment contract with defendant. All the facts and circumstances surrounding the contract are agreed, plaintiff and defendant only disagree over the applicability of the statute. Therefore, we find and conclude that the motion is properly considered as a motion for summary judgment under Rule 56, F.R.Civ.P.

Both parties agree that the employment contract between plaintiff and defendant was entered into in Wisconsin on October 8, 1956. At the time, plaintiff was a resident of Wisconsin. Plaintiff was trained and eventually worked in defendant's Manitowoc, Wisconsin general office. In 1957, plaintiff was assigned a sales territory consisting of portions of Missouri and Kansas. Eventually plaintiff's sales territory increased to include all of Kansas and portions of Oklahoma, and he moved to Kansas. During the period from 1971 until his discharge on May 21, 1975, plaintiff was supervised from defendant's office in Houston, Texas.

Plaintiff's discharge was effectuated during a meeting held at the Kansas City International Airport located in Platte County, Kansas City, Missouri. All further communication between plaintiff and defendant, which included plaintiff's alleged request for a service letter, were through the mails between plaintiff's home in Kansas and defendant's office in Wisconsin. On the basis of these facts,

both parties agree that the only contacts with the State of Missouri were (a) plaintiff's sales territory included portions of Missouri, and (b) plaintiff was informed of his discharge during a meeting in Missouri.

The cases interpreting the Missouri service letter statute have consistently construed the statute strictly. *Horstman v. General Electric Company*, 438 S.W. 2d 18 (1969). In *Horstman*, the Missouri Court of Appeals, Kansas City District, held that the Missouri service letter had no bearing on an employment contract entered into and executed in Kansas. The Court stated:

> It is also clear that the service letter statute becomes a part of the employment contract of workers who are hired and who work in the State of Missouri for a corporation doing business in Missouri. Certainly the Legislature did not intend the service letter statute to have extra-territorial application, such as appellant seeks in this case. *Id* at 20.

While the facts in *Horstman* are distinguishable, the principle in the case is still relevant. In *Horstman*, defendant corporation was doing business in Missouri and plaintiff resided in Missouri. All other relevant contacts were in Kansas. Plaintiff was hired in Kansas, worked in Kansas, was fired in Kansas, and requested his service letter in Kansas. The Court concluded that there were no contacts between appellant, as an employee, and the State of Missouri.

Plaintiff in this case was discharged at a meeting in Missouri and part of his sales work was in Missouri. However, neither of these contacts is sufficient to invoke the obligations of the service letter statute under the principles established in *Horstman*. It can hardly be said that when these parties entered into the employment relationship in Wisconsin the Missouri service letter statute became a

binding part of their contract. Plaintiff was hired in Wisconsin, trained in Wisconsin, and later conducted his business out of his home/office in Kansas.

Further, we have serious doubt that defendant is a corporation doing business in Missouri so as to subject it to the terms of the Missouri service letter statute. A well established principle in Missouri law is that the mere solicitation of orders by field representatives on behalf of foreign corporations does not constitute "doing business within this state" so as to subject foreign corporations to certain local statutes prescribing conditions for doing business within the state. *Superior Concrete Accessories v. Kenyar*, 284 S.W. 2d 482, 486 (1955). Given the strict construction to the statute as required by Missouri courts, we do not believe defendant would be considered a "corporation doing business in this [Missouri] state."

Neither the Missouri discharge nor the Missouri sales territory were sufficient to transform an employment contract that was otherwise obviously a Wisconsin contract into a Missouri contract. Plaintiff contracted with a corporation whose principal place of business was in Wisconsin, and plaintiff maintained his office in Kansas. Therefore, we find and conclude that the Missouri service letter statute does not apply to the employment contract in this case.

For the reasons stated, it is

ORDERED that defendant's alternative motion for summary judgment should be, and the same is, hereby granted.

/s/ John W. Oliver
John W. Oliver
Chief Judge

Dated: August 3, 1977
Kansas City, Missouri